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Within the past week the death of Mr. William L. Murfree, a former editor of this JOURNAL, occurred at his old home in Murfreesboro, Tennessee, to which place he had retired some years ago. Mr. Murfree's services in connection with this publication extended through a period of three years, during which time he edited the JOURNAL with satisfaction both to the publisher and its readers. He was not only well versed in the law, but was a man of considerable literary accomplishments, and was the author of several legal text works of recognized authority. Withal he was a rare specimen of one of nature's gentlemen, and those who were associated with him will long remember his kindly disposition and his upright life.

A Colorado subscriber calls our attention to the fact that the case of Wyatt v. Larimer, upon which we commented in a recent issue, was not decided by the supreme court of that State, but by the court of appeals. The decision in that case, it appears, is subject to review by the supreme court of the State, and is at present pending in that court. The case attempts to reverse some of the well-settled decisions of the State of Colorado upon water rights, and is liable to be modified or reversed in the supreme court.

It would be well for the Supreme Court of Missouri to take an early occasion to declare what the law of that State is, regarding the question as to who are to be considered as "fellow-servants in the same common employment" within the rule exempting the master from liability for injuries caused by the negligence of a co-servant. Judge Gantt, in the Parker case, reported in full on page 187 of this issue, by way of answer to the request of counsel that the court lay down some definite principle or rule by which employers could govern themselves, says that "after a careful examination of this subject, in its varied aspects, we think the attempt would be futile and unsatisfactory." So far as a general statement of the law, outside of the record under consideration, is concerned, this position is undoubtedly correct. No one has yet been able to state a rule of law upon that subject which is susceptible of satisfactory application to every particular state of facts. But, unfortunately for the practitioner, the decisions of the Missouri court in the various cases which have come before it, involving the determination of the question as to fellow-service, have been so inharmonious and conflicting that it is almost impossible to determine what the law is on any given state of facts. Even the members of the court, as is shown by the dissenting opinions in the Parker case, differ as to the scope and effect of the earlier rulings of the court; and of the cases lately decided involving this question, some are in apparent irreconcilable conflict. An interesting review of these decisions by a member of the Kansas City bar will be found on page 191 of this issue. The reader will find there ample ground for the belief that the Missouri law of fellow-servants needs to be reconstructed.

The late English case of Brown v. Foot, decided by the Queen's Bench Division, is a reminder that there are offenses of which a defendant may be guilty without actual knowledge or intent on his part, and even without participation. In the case mentioned, the servant of a milk dealer, employed by his master to sell milk, adulterated it with water. There was no evidence that the defendant was himself cognizant that there had been any adulteration of the milk before the sale of the adulterated milk took place. On the contrary, there was evidence of written orders requiring the men to be careful about the purity of the milk, and certain procedure was required to be gone through with in order that there might be no tampering with the milk. The servant himself confessed that he had adulterated the milk before selling it. On the trial, the master was convicted as the seller of adulterated milk, under the act of 1875, and on appeal to the Queen's Bench, this conviction was held right, whether the master did or did not connive at the offense. Mr. Justice Hawkins decided that connivance was immaterial, and the mere actual sale of the

milk is that which creates what it is difficult to call an offense. He held that it was not necessary to prove any connivance or any knowledge of the adulteration, and that the master was liable, though he were utterly unacquainted with the fact of the adulteration. The milk was sold by his authority; it was sold as milk which he, the master, was delivering through the hands of his agent to the purchaser, and in the view of the court he was responsible in the penalty which was imposed upon him for the sale of such adulterated milk.

There have been cases in this country where it has been held that the plea that the accused did not know that provisions were adulterated, is no defense. Under the penal code of the State of New York (and this may be true in some other of the States) there must be evidence of intent or knowledge, which perhaps may be inferred from the circumstances, or may be presumed, from the fact that the milk or other food is adulterated, unless such knowledge or intent is negatived by proof to the contrary.

NOTES OF RECENT DECISIONS.

PARTNERSHIP—WHAT CONSTITUTES —SHARING OF PROFITS.—It is often a nice question to determine whether a given state of facts constitutes a partnership in law as between several persons (see article in 32 Cent. L. J. 268, on Sharing of Profits as a Test of Partnership), and the mere sharing of profits is not always a true test of partnership, as is shown by the case of Meehan v. Valentine, recently decided by the Supreme Court of the United States. It was there determined that the mere loaning of money to a partnership for a definite period, under an agreement that the debtor shall receive interest and also one-tenth of the excess in yearly profits over $10,000, which agreement is renewed for several successive years, does not make the lender liable as a partner. Mr. Justice Gray says:

Some of the principles applicable to the question of the liability of a partner to third persons were stated by Chief Justice Marshall in a general way, as follows: "The power of an agent is limited by the authority given him; and, if he transcends that authority, the act cannot affect his principal; he acts no longer as an agent. The same principle applies to partners. One binds the others so far only as he is the agent of the others." "A man who shares in the profit, although his name may not be in the firm, is responsible for all its debts." "Stipulations [restricting the powers of partners] may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law." Winship v. Bank, 5 Pet. 529, 561, 562. And the chief justice referred to Waugh v. Carver, 2 H. Bl. 235; *Ex parte* Hamper, 17 Ves. 403, 412; and Gow, Partn. 17.

How far sharing in the profits of a partnership shall make one liable as a partner has been a subject of much judicial discussion, and the various definitions have been approximate rather than exhaustive.

The rule formerly laid down, and long acted on as established, was that a man who received a certain share of the profits as profits, with a lien on the whole profits as security for his share, was liable as a partner for the debts of the partnership, even if it had been stipulated between him and his copartners that he should not be so liable; but that merely receiving compensation for labor or services, estimated by a certain proportion of the profits, did not render one liable as a partner. Story, Partn. ch. 4; 3 Kent, Comm. 25, note, 32 34; *Ex parte* Hamper, above cited; Pott v. Eyton, 3 C. B. 32, 40; Bostwick v. Champion, 11 Wend. 571, 18 Wend. 175, 184, 185; Burckle v. Eckart, 1 Denio, 337, and 3 N. Y. 132; Denny v. Cabot, 6 Mete. (Mass.), 82; Fitch v. Harrington, 13 Gray, 468, 474; Brundred v. Muzzy, 25 N. J. Law, 268, 279, 674. The test was often stated to be whether the person sought to be charged as a partner took part of the profits as a principal, or only as an agent. Benjamin v. Porteus, 2 H. Bl. 590, 592; Coll. Partn. (1st Ed.) 14; Smith, Merc. Law (1st Ed.), 4; Story, Partn. § 55; Loomis v. Marshall, 12 Conn. 69, 78; Burckle v. Eckart, 1 Denio, 337, 341; Hallett v. Desban, 14 La. Ann. 529.

Accordingly, this court, at December term, 1860, decided that a person employed to sell goods under an agreement that he should receive half of the profits, and that they should not be less than a certain sum, was not a partner with his employer. "Actual participation in the profits as principal," said Mr. Justice Clifford in delivering judgment, "creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits," or "may have expressly stipulated with his associates against all the usual incidents to that relation. That rule, however, has no application whatever to a case of service or special agency, where the employee has no power as a partner in the firm and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services." Berthold v. Goldsmith, 24 How. 536, 542, 543. See, also, Seymour v. Freer, 8 Wall. 202, 215, 222-226; Beckwith v. Talbot, 95 U. S. 289, 293; Edwards v. Tracy, 62 Pa. St. 374; Burnett v. Snyder, 81 N. Y. 550, 555.

Mr. Justice Story, at the beginning of his Commentaries on Partnership, first published in 1841, said: "Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he may as properly be deemed an agent. The principal distinction between him and

a mere agent is that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership; whereas an agent, as such, has no interest in either. Pothier considers partnership as but a species of mandate, saying, *contractus societatis, non secus ac contractus mandati.*" Afterwards, in discussing the reasons and limits of the rule by which one may be charged as a partner by reason of having received part of the profits of the partnership, Mr. Justice Story observed that the rule was justified, and the cases in which it had been applied reconciled, by considering that "a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances;" but that it is not "to be regarded as anything more than mere presumptive proof thereof, and therefore liable to be repelled and overcome by other circumstances, and not as of itself overcoming or controlling them;" and therefore that, "if the participation in the profits can be clearly shown to be in the character of agent, then the presumption of partnership is repelled." And again: "The true rule, *ex aequo et bono*, would seem to be that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock, or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons." Story, Partn. §§ 1, 38, 49.

Baron Parke (afterwards Lord Wensleydale) appears to have taken much the same view of the subject as Mr. Justice Story. Both in the court of exchequer and in the house of lords he was wont to treat the liability of one sought to be charged as a dormant partner for the acts of the active partners as depending on the law of principal and agent. Beckham v. Drake (1841), 9 Mees. & W. 79, 98; Wilson v. Whitehead (1842), 10 Mees. & W. 503, 504; Ernest v. Nicholls (1857), 6 H. L. Cas. 401, 417; Cox v. Hickman (1860), 8 H. L. Cas. 268, 312. And in Cox v. Hickman he quoted the statements of Story and Pothier from Story, Partn. § 1, above cited.

In that case, two merchants and copartners, becoming embarrassed in their circumstances, assigned all their property to trustees, empowering them to carry on the business, and to divide the net income ratably among their creditors (all of whom became parties to the deed), and to pay any residue to the debtors, the majority of the creditors being authorized to make rules for conducting the business or to put an end to it altogether. The house of lords, differing from the majority of the judges who delivered opinions at various stages of the case, held that the creditors were not liable as partners for debts incurred by the trustees in carrying on the business under the assignment. The decision was put upon the ground that the liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent; that a right to participate in the profits, though cogent, is not conclusive, evidence that the business is carried on in part for the person receiving them; and that the test of his liability as a partner is whether he has authorized the managers of the business to carry it on in his behalf. Cox v. Hickman, 8 H. L. Cas. 268, 304, 306, 312, 313, nom. Wheatcroft v. Hickman, 9 C. B. (N. S.) 47, 90, 92, 98, 99.

This new form of stating the general rule did not at first prove easier of application than the old one; for in the first case which arose afterwards one judge of three dissented (Kilshaw v. Jukes, 3 Best. & S. 847); and in the next case the unanimous judgment of four judges in the common bench was reversed by four judges against two in the exchequer chamber. Bullen v. Sharp, 18 C. B. [N. S.] 614, and L. R. 1 C. P. 86. And, as has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership rather than partnership from agency. Kelly, C. B., and Cleasby, B., in Holme v. Hammond, L. R. 7 Exch. 218, 227, 233; Jessel, M. R., in Pooley v. Driver, 5 Ch. Div. 458, 476. Such a test seems to give a synonym, rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent.

In the case last above cited, Sir George Jessel said: "You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners,—a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity." And in a very recent case the court of appeals of New York, than which no court has more steadfastly adhered to the old form of stating the rule, has held that a partnership, though not strictly a legal entity as distinct from the persons composing it, yet being commonly so regarded by men of business, might be so treated in interpreting a commercial contract. Bank v. Thompson, 121 N. Y. 280, 24 N. E. Rep. 473.

In other respects, however, the rule laid down in Cox v. Hickman has been unhesitatingly accepted in England, as explaining and modifying the earlier rule. *In re* English & Irish Society, 1 Hem. & M. 85, 106, 107; Mollwo v. Court of Wards, L. R. 4 P. C. 419, 435; Ross v. Parkyns, L. R. 20 Eq. 331, 335; *Ex parte* Tennant, 6 Ch. Div. 303; *Ex parte* Delhasse, 7 Ch. Div. 514; Badeley v. Bank, 38 Ch. Div. 238. See, also, Davis v. Patrick, 122 U. S. 138, 151, 7 Sup. Ct. Rep. 1102; Eastman v. Clark, 53 N. H. 276; Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. Rep. 295; Seabury v. Bolles, 51 N. J. Law, 103, 16 Atl. Rep. 54, and 52 N. J. Law, 413, 21 Atl. Rep. 952; Morgan v. Farrel, 58 Conn. 413, 20 Atl. Rep. 614.

In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third per-

sons. And participating in profits is presumptive, but not conclusive evidence of partnership.

In whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner, in any sense. So an agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee. Perrine v. Hankinson, 11 N. J. Law, 181; Holmes v. Railroad Co., 5 Gray, 58; Beecher v. Bush, 45 Mich. 188, 7 N. W. Rep. 785. And it is now equally well settled that the receiving of part of the profits of a commercial partnership, in lieu of or in addition to interest, by way of compensation for a loan of money, has of itself no greater effect. Wilson v. Edmunds, 130 U. S. 472, 482, 9 Sup. Ct. Rep. 563; Richardson v. Hughitt, 76 N. Y. 55; Curry v. Fowler, 87 N. Y. 33; Cassidy v. Hall, 97 N. Y. 159; Smith v. Knight, 71 Ill. 148; Williams v. Soutter, 7 Iowa, 435, 446; Smelting Co. v. Smith, 13 R. I. 27; Mollwo v. Court of Wards, and Badeley v. Bank, above cited.

In some of the cases most relied on by the plaintiff, the person held liable as a partner furnished the whole capital on which the business was carried on by another, or else contributed part of the capital and took an active part in the management of the business. Beauregard v. Case, 91 U. S. 134; Hackett v. Stanley, 115 N. Y. 625, 627, 628, 635, 22 N. E. Rep. 745; Pratt v. Langdon, 12 Allen, 544, and 97 Mass. 97; Rowland v. Long, 45 Md. 439. And in Mollwo v. Court of Wards, above cited, after speaking of a contract of loan and security, in which no partnership was intended, it was justly observed: "If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character." L. R. 4 P. C. 438. But in the case at bar no such element is found.

COVENANTS—RESTRICTING USE OF LAND—ENFORCEMENT BY SUBSEQUENT PURCHASERS.—The decision of the Court of Chancery of New Jersey, in De Gray v. Monmouth Beach Club House Co., 24 Atl. Rep. 388, contains a valuable discussion by Vice-chancellor Green of the law relating to covenants restricting the use of land. The vice-chancellor expresses clearly the principles on which such covenants are enforced in equity in favor of purchasers of other lands from the same grantor subject to the same covenant. The bill was filed by a purchaser of one lot against a subsequent purchaser of another lot, both lots having been sold subject to a covenant with the original grantor that the lands should not be used for certain purposes. There was no privity, therefore, between the defendant and the complainant, and the defendant was not in the position of having purchased his lot subject to a covenant with the complainant with respect to that lot, nor was the complainant in the position of having acquired by his purchase the rights reserved by the defendant's grantor, the defendant having purchased after the complainant. The vice-chancellor said, therefore, that the complainant's claim could not be based upon the principle of Tulk v. Mooxhay, 2 Phill. Ch. 774, that one who has purchased land with knowledge of a restrictive covenant with regard to its use shall not be permitted to use it in violation of the covenant, nor yet upon the principle that a subsequent grantor takes the benefit of a covenant in favor of the land, but that some other principle must be found to support those cases in which it is held that the purchaser of one lot may maintain an action against the purchaser of another, to enforce a restrictive covenant made in favor of a common grantor. After examining the cases, he says the right of action depends upon the existence of a general plan or scheme for the development or improvement of the property and that the law seems to be that where there is such a general plan by which restrictions in the use of the lands are contemplated, and lots are sold, and a restrictive covenant is inserted in each deed in pursuance of the plan, then one purchaser, or his assigns may enforce the covenant against any other purchaser or his assigns, if he has bought with knowledge of the scheme and the scheme is a part of the subject-matter of the purchase.

In the case in hand, the principle became important in determining the meaning of the covenant as well as the right of the complainant to enforce it. The covenant was construed in view of the nature of the general scheme which appeared as the basis of the purchase. The covenant was that the land should not be used for certain purposes, or for "any other uses or purposes that shall depreciate the value of the neighboring property for dwelling houses." The court held that where the general scheme appeared to be to provide for summer residences on the seashore, together with what was called a club house, a building to be used for bathing purposes by the occupants of cottages and of the club house was not intended to be excluded by the covenant, even though the building might be used by a large number of people and might cause some annoyance to the oc-

cupants of the cottages immediately adjoining.

The opinion refers to nearly all the English and American cases bearing upon the subject.

CONFLICT OF LAWS CONCERNING ACTIONS FOR DEATH.

It is now well settled that the courts of one State will, by comity, enforce rights of action transitory in their nature created by the statute of another State, unless it appears to be contrary to the public policy of the State where such rights are sought to be enforced.[1] Generally stated, the actions given by the statutes of the various States for injuries to the person, resulting in death, are not penal, imposing a punishment for a wrong, but are purely civil, to recover damages by way of compensation for the injuries sustained by another's negligence.[2] Hence, such actions are not local but transitory, and, under the well settled doctrine above stated, will be enforced in any jurisdiction to which the defendant can be subjected, provided the right of action does not contravene the policy of the *lex fori*. As the statutes of no two States creating these actions are precisely alike, and as some States have no statutes upon the subject, the difficulty has been in determining whether the policy of one State is in accord or conflict with that of another. In Minnesota (where there was no statute giving a remedy for death), a right of action arising under the Iowa statute was enforced, the court saying that "to justify a court to refuse to enforce a right of action which accrued under the laws of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interest of our own citizens."[3] Unfortunately the courts of several States have not adopted this broad view. The Supreme Court of Maryland refused to sustain an action which accrued under the statute of West Virginia, because that statute differed from the Maryland statute in its provisions respecting in whose name the action should be brought, the limitation of the amount recoverable, the limitation of time in which the action might be brought, the beneficiaries named (although belonging to the same class, namely, immediate relatives of the deceased) and the apportionment of the fund.[4] The Supreme Court of Texas refused to enforce a right of action given by the Arkansas statute on account of similar dissimilarities between the statutes there involved.[5]

The above cases, though recent, are, however, contrary to the general current of modern decisions since the leading case of Leonard v. Columbia Steam Nav. Co., *supra*, decided in 1881, where it was held that like differences between the statutes of New York and Connecticut did not antagonize the general policy common to both. The policy of the law is its general spirit and purpose. It deals in rights, not remedies, in principles, not procedure, and is but the broad tendency of legislation. It seems evident that the purpose and policy of most, if not all, of the statutes on the subject of redress for death was to remedy the same common law injustice, namely, the abatement of the action upon the death of the person injured, leaving remediless his immediate family who by such death have suffered pecuniary loss. This policy is unaffected by the details of remedy and procedure. Proceeding in this view the weight of authority has established what must now be considered to be the true rule, namely, that if the statutes in question are of the same general import and character, aimed at the same evil, construct the same kind of an action for the benefit of the same class of individuals and are substantially the same in their main and fundamental characteristics, then they express the same public policy, and the rights accruing under one will be enforced in the territorial domain of the other.[6]

So, it is held that a right of action upon a

[1] Leonard v. Columbia, etc. Co., 84 N. Y. 48; Dennick v. R. Co., 103 U. S. 11; McLeod v. R. R. Co., 58 Vt. 727; Bruce v. Ry. Co., 83 Ky. 174; Herrick v. Minneapolis, etc. R. Co., 31 Minn. 11; R. Co. v. Spraberry, 8 Baxt. (Tenn.) 341; Boyce v. R. Co., 63 Iowa, 70; Morris v. R. Co., 65 Iowa, 727; R. Co. v. Doyle, 60 Miss. 977; Knight v. R. Co., 108 Pa. St. 250; Usher v. R. Co., 126 Pa. St. 206; Burns v. Grand Rapids R. Co., 113 Ind. 169; Shedd v. Moran, 10 Brad. (Ill. App.) 618; Wooden v. Western, etc. R. Co., 26 N. E. Rep. 1050; Hanna v. Grand Trunk R. Co., 41 Ill. App. 116.

[2] Mayhew v. Burns, 103 Ind. 328, 335; Burns v. Grand Rapids R. Co., 113 Ind. 169.

[3] Herrick v. Minneapolis, etc. R. Co., 31 Minn. 11.

Ash v. B. & O. R. Co., 19 Atl. Rep. 643.

St. Louis, etc. R. Co. v. McCormick, 9 S. W. Rep. 540.

[6] Leonard v. Columbia, etc. Co., 84 N. Y. 48; Wooden v. Western, etc. R. Co., 26 N. E. Rep. 1050.

foreign statute will be enforced, notwithstanding that such statute differs from the statute of the State where the action is brought with respect to the beneficiaries of the action,[7] the proportions in which the damages shall be distributed,[8] and the limitation of the amount recoverable.[9] And in Illinois, an action was sustained upon an Indiana statute which differed from the Illinois statute, not only in all of the above particulars, but also with respect to the paty to whom the action was given—the only similarity being that both gave a remedy for injuries resulting in death.[10] In Illinois, also, a right of action accruing under a statute of the Province of Ontario was enforced, although that statute provided that the jury may determine the amount to which each beneficiary shall be entitled, while under the Illinois statute the amount would be distributed as personal estate of the deceased.[11]

In all actions of this kind the law of the place where the right was acquired will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the *lex fori*.[12] In New York, the amount of damages recoverable is held to be matter of remedy only.[13] Otherwise in Illinois, where it is said that "it is the right given by the foreign law to its full value and extent as created by said foreign law that our courts by comity will enforce."[14]

The action must be brought by the person to whom the right of action is given by the foreign statute;[15] but if the action is given to the administrator, it may be maintained by one appointed by and under the law of the place where the action is brought.[16] In such a case the administrator receives and holds the sum recovered, of which he is simply a trustee, to be distributed in accordance with the provisions of the foreign statute; and if the court having supervision of such administrator, or the court in which the judgment is rendered has not the power or legal machinery to authorize and compel the distribution of the fund according to the peculiar provisions of the foreign statute, a court of equity will do so.[17] In answer to the objection that a New York administrator could not distribute except according to New York law, Justice Miller, speaking for the Supreme Court of the United States, said: "It would be a reproach to the laws of New York to say that when the money recovered in such an action as this came to the hands of the administrator, our courts could not compel the distribution as the law directs."[18]

Chicago, Ill. GILBERT E. PORTER.

[7] In Morris v. Chicago, etc. R. Co., 65 Iowa, 727, the action was upon the Illinois statute making the "widow and next of kin" the exclusive beneficiaries, while by the Iowa statute the action is given for the benefit of the "husband, wife, parent or child surviving," and, if none survive, deceased's "estate." In Knight v. West Jersey R. Co., 108 Pa. St. 250, the death occurred in New Jersey, where the statute made the "widow and next of kin" the beneficiaries, while the statute of Pennsylvania, where the suit was brought, gave the action for the benefit of the widow and children alone, excluding other kin. In Shedd v. Moran, 10 Brad. (Ill. App.) 618, the suit was upon an Indiana statute giving an action to the father, and for his exclusive benefit, for the death of a child, while the only Illinois statute upon the subject of an action for death gives the action for the exclusive benefit of the "widow and next of kin." Indeed, in nearly every case cited in this article, where the action was sustained, the statutes involved presented similar differences.

[8] Leonard v. Columbia, etc. Co., 84 N. Y. 48. In this case the statutes involved differed in the respect named, although such difference does not appear in the report of the case. See also Dennick v. R. Co., 103 U. S. 11; Ill. Cent. R. Co. v. Crudup, 63 Miss. 291; Morris v. Chicago, etc. R. Co., 65 Iowa, 727.

[9] Wooden v. Western, etc. R. Co., 26 N. E. Rep. 1050; Morris v. Chicago, etc. R. Co., 65 Iowa, 727.

[10] Shedd v. Moran, 10 Brad. (Ill. App.) 618.

[11] Hanna v. Grand Trunk R, Co. 41 Ill. App. 116.

[12] Herrick v. Minneapolis, etc. R. Co., 31 Minn. 11.

[13] Wooden v. Western, etc. R. Co., 26 N. E. Rep. 1050. But in the recent case of Cavanaugh v. Ocean Steam Nav. Co., 13 N. Y. Supp. 540, decided by the Supreme Court of New York, the limitation of time within which the action could be brought was held to be matter of right, and not of remedy, and must be governed by the *lex loci contractus*. See *contra:* Morgan v. Metropolitan Ry. Co., decided by the Kansas City Court of Appeals, and commented upon in 34 Cent. L. J. 278.

[14] Hanna v. Grand Trunk R. Co., 41 Ill. App. 116.

[15] Usher v. R. Co., 126 Pa. St. 206.

[16] In each of the following cases the action was upon a foreign statute brought by an administrator, appointed under the *lex fori* and was sustained: Ill. Cent. R. Co. v. Crudup, 63 Miss. 291; Morris v. Chicago, etc. R. Co., 65 Iowa, 727; Leonard v. Columbia, etc. Co., 84 N. Y. 48; Dennick v. R. Co., 103 U. S. 11; Burns v. Grand Rapids R. Co., 113 Ind. 169; Bruce v. Cincinnati R. Co., 83 Ky. 174, the last case named overruling Taylor v. Penn. R. Co., 78 Ky. 348, with respect to this point. It is otherwise held in Missouri, on account of a statute in force in that State expressly prohibiting an administrator from bringing any suit for injuries to, or for the death of, the person of his intestate. Vawter v. Mo. Pac. R. Co., 84 Mo. 679. It was also held otherwise in Richardson v. New York Central, 98 Mass. 85; Woodward v. R. Co., 10 Ohio St. 121; McCarty v. Chicago, etc. R. Co., 18 Kan. 46, But the doctrine of these cases has been condemned and overruled by the modern decisions cited above.

[17] Hanna v. Grand Trunk R. Co., 41 Ill. App. 116.

[18] Dennick v. R. Co., 103 U. S. 11.

FELLOW-SERVANTS—COMMON EMPLOYMENT.

PARKER V. HANNIBAL & ST. J. R. CO.

Supreme Court of Missouri, March 28, 1892.

Railroad section hands engaged in ballasting the railroad track with stone, which is hauled to them on a construction train, and unloaded by the train men, are in a common employment, and are fellow-servants with the train men.

GANTT, J.: Plaintiff's husband was a section hand in the service of the defendant at the time he was killed. He had been in this same employment for about two years prior to his death. At the time of his death, he was tamping rock under the head block at the switch, near Randolph Bluff, stooping, with his back towards the west. He was struck by a car, in a construction train coming from the west, on defendant's track, in charge of defendant's train men, who were and had been, for some three months, engaged in hauling and unloading crushed rock for ballast for this section. The train had discharged its load of rock, and was backing, caboose in front, to Minarville, some five miles distant, in order to clear the track for the afternoon passenger train. Just at the time plaintiff's husband, William C. Parker, was struck, a freight train of 48 cars was passing on the track of the Wabash Railroad, about 9 feet distant and at this point parallel to defendant's road. The Wabash train was making a great noise. The evidence for the plaintiff was that Parker and his associate section men did not hear any signals, by way of bell ringing or whistle blowing, on the part of those in charge of the construction train. On the part of the train men, there was much positive evidence that, just prior to starting the train back on the main track, the engineer sounded his whistle. About 150 yards west of the point where Parker was struck there was a curve in defendant's road. The engineer and other train men testify that, when nearing this curve, the engineer gave four signals, two long and two short blasts of the whistle. All the section men except Parker saw the train in time to avoid it, and did so. Three of them, seeing that Parker was apparently wholly unconscious of its approach, ran towards him, and attempted to attract his attention by calling to him in loud voice, but it seems clear now that the noise on the Wabash train prevented his hearing them. Plaintiff bases the right to recover on the grounds that defendant's train men on the construction train were running it at a high, unusual, dangerous, and reckless rate of speed; that her husband was stooping with his back to the west, when this train, suddenly and without warning or signal by whistle or bell, was run over him; that it was racing with the Wabash train at the time.

There are a number of specific exceptions saved in the record, but it is plain that one question of controlling importance arises on this record—were the train men operating the construction train that killed plaintiff fellow-servants of his, working for a common master in a common service, and, if so, is defendant liable for the injury? Learned counsel for defendant, in his argument of this cause, urged us to lay down some definite principle or rule by which employers could govern themselves. After a careful examination of this subject, in its varied aspects, we think the attempt would be futile and unsatisfactory. The judge or court who would deal in general observations, outside of the record under consideration, would be treading on dangerous ground, and in a very short time would probably find himself "hoisted by his own petard." It is unnecessary to go over the learning and history of the rule that the master is not liable to his servant for the injury resulting from the negligence of his fellow-servant in the same common service. See Ell v. Railroad Co. (N. D.), 48 N. W. Rep. 222. An examination of the cases in this court will show that this court has never denied the rule. McDermott v. Railroad Co., 30 Mo. 115; Rohback v. Railroad Co., 43 Mo. 187; McGowan v. Railroad Co., 61 Mo. 528; Brothers v. Cartter, 52 Mo. 372; Gibson v. Railroad Co., 46 Mo. 163; Marshall v. Schricker, 63 Mo. 308; Smith v. Railway Co., 92 Mo. 359, 4 S. W. Rep. 129; Sherrin v. Railway Co., 103 Mo. 378, 15 S. W. Rep. 442; Murray v. Railway Co., 98 Mo. 573, 12 S. W. Rep. 252; Relyea v. Railway Co., (Mo. Sup., March, 1892), 19 S. W. Rep. 1116; Higgins v. Railway Co., 104 Mo. 413, 16 S. W. Rep. 409; Schaub v. Railroad Co., (Mo. Sup.) 16 S. W. Rep. 924.

The main and only difficulty has been to satisfactorily determine, at all times, whether the employment was a common service, and the employees fellow-servants, within the meaning of the rule; and, after due consideration, we are of the opinion that, unsatisfactory as it may seem, the rule itself must remain general; its application specific, as the cases arise. This rule, to exempt the master, requires the servants shall be employed by a common master, and the servants must be employed in the same common employment. In this case we have the first essential. The petition and evidence all show that plaintiff's husband and the train men on the construction train were employed by the same master, the defendant. Were they fellow-servants in a common employment?

The record shows plaintiff's husband was and had been for two years a section hand in defendant's employ, working on this section of defendant's railroad, repairing and keeping the track in a safe condition for trains. He was at this work, tamping rock under the block of the switch, at the time he was killed. The train men were in charge of a construction train, which for three months had daily hauled rock from a crusher at Minarville, five miles east of the point where Parker was killed, and unloaded it on this same section, for the purpose, also, of ballasting the track to insure safety of trains passing over it. It is in evidence that this train made two trips daily over this section; that plaintiff's husband had been engaged for two weeks near the place where

he was killed; that this train passed the point where he was killed about the same time, every afternoon, about five o'clock. These construction trains can only work between the schedule time of regular trains. It was in evidence that track men or section men were expected to look out for trains and clear the track. It was a rule of the defendant that whistles should be sounded in going around curves. That the work of deceased and the construction train crew tended to one common end, to-wit, the repairing, and, in this instance, the ballasting, of a common track on a common section, is unquestionable. One set of the employees were managing the train, hauling and unloading the crushed rock; and the other, the regular section men, were carefully disposing of this rock, and tamping it under the rails and switches. Neither had the least control of the other. While they were working in harmony to accomplish a common purpose, the repairing and improvement of their employer's track on this section, neither could command or direct the other. Again, they bore the same general relation to the master. That is to say, in repairing this track, they were both engaged in doing a work that the law devolved upon the defendant, and they were both engaged in assisting their common master in discharging a duty to the public and its train men who traveled in regular trains over this track. This train passed every day about the hour of this unfortunate accident. Plaintiff's husband was familiar with the track and the curves. He had worked there two years. He also knew of the proximity of the Wabash road. We believe it is conceded by all of the courts, not those who follow the rule in the Farwell Case, 4 Metc. (Mass.) 49 but those who deny it, that the servant assumes the natural risks incident to the common course of the business, including the negligence of his fellow-servants. When plaintiff's husband went to work on the track that afternoon, he was certainly aware that this train would pull by him about the usual time to clear the track for the afternoon passenger train. In so doing, it would be following a regular or natural course. His work brought him to work on the same track, at the same time the work of the train men brought them there serving a common master; and both understood the risk from this necessary contact; and the negligence of the one in doing his work might injure the other in doing his work. Hence we conclude that, applying these facts to the general rule, they make a case of fellow-servants in a common employment.

In Rohback v. Railroad Co., 43 Mo. 187, the facts were the plaintiff was a section man at work on the defendant's railroad at a place near the foot of Jefferson street, in Jefferson City, where the railroad crossed a street. While so employed, the train men in charge of a locomotive and train of cars, without ringing a bell or sounding a whistle, ran the train over plaintiff. This court then held that a section man and the train men were fellow-servants, and plaintiff could not recover, though it was assumed the negligence of the train men was clearly shown, and the majority of this court still approve that case. We are not aware that this court has ever repudiated that case. In Whalan v. Railroad Co., 8 Ohio St. 249, the facts were as follows: Plaintiff was a section hand or track man working in repairing the track. He alleged there was a man employed on one of defendant's trains whose duty it was to pass firewood from the tender to the engine, and, on finding sticks unsuitable, he cast the same from the train. That this train was passing where plaintiff was at work on the track. He retired from the track, and, as the train passed, this fireman improperly threw a stick of wood from the tender; it struck plaintiff, and put out his eye. That court said: "This case, it will be perceived, is not one in which the injured party is placed by their common employer in a position subordinate to and subject to orders of the fellow-servant, through whose negligence and misconduct the injury occurs," so as to come within the principle decided in Railroad Co. v. Stevens, 20 Ohio, 415, and Railroad Co. v. Keary, 3 Ohio St. 201, "but presents the simple question whether the master or employer is liable to one servant for injuries received from the negligence of a fellow-servant, where no relation of subordination or subjection exists between them while engaged in the business of their common employer." That court answered the question in the negative, holding the track man and the fireman fellow-servants. This case is the more significant, because it came from a court that first denied the rule in the Farwell Case, in the cases cited by Judge Napton in McDermott v. Railroad Co., 30 Mo. 115.

In 1842, Farwell v. Railroad Co., 4 Metc. (Mass.) 49, was decided. In that case an engineer was injured by the negligence of a switchman who left the switch open, and the engine was thereby run off the track. It was shown that the switchman was a careful and trustworthy servant. Farwell sued the company, and the Supreme Court of Massachusetts held he could not recover. That decision was subsequently followed by the Supreme Court of the United States in Randall v. Railroad Co., 109 U. S. 484, 3 Sup. Ct. Rep. 322, (1883). In that case, the evidence showed the injury occurred at night, at a place where there was a network of tracks, in the defendant's railroad yard, near the junction of a branch road with the main road, and about 10 rods from a highway crossing. Plaintiff had previously been employed on another part of the road. On the night in question, in the performance of his duty as a brakeman on a freight train, he unlocked a switch, which enabled his train to pass from one track to another, and he was stooping down, with his lantern on the ground beside him, to unlock the ball of a second switch, to let the engine of his train pass to a third track, when he was struck and injured by the tender of another freight engine, in no way connected with his train, backing down on the second track. From

the evidence it appeared the switch could be worked safely by a man standing midway between the two tracks, using reasonable care. It could not be safely worked by standing at the end of the handle, while an engine was coming on the track next that end. The engine that struck plaintiff was being driven at a speed of about 12 miles an hour by an engine man in defendant's employ, and there was evidence that it had no light except the head-light, and no bell, and its whistle was not sounded. A demurrer to the evidence was sustained. Mr. Justice Gray, in delivering the opinion of the court, said: "The general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. This court has not hitherto had occasion to decide who are fellow-servants, within the rule." "Nor is it necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh conflicting views which have prevailed in the courts of the several States, because persons standing in such a relation to one another as did the plaintiff and the engineer of the other train are fellow-servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the house of lords and in the English and Irish courts." "They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time. So that the negligence of the one in doing his work may injure the other in doing his work." "Their separate services have an immediate common object, the moving of the trains." "Neither works under the orders or control of the other." "Each, by entering into his contract of services, takes the risk of the negligence of the other in performing his service, and neither maintains an action for an injury caused by such negligence against the common master." "The only cases cited which have any tendency to support the opposite conclusion are the decisions in Chamberlain v. Railroad Co., 11 Wis. 248, and Haynes v. Railroad Co., 3 Cold. 222, each of which wholly repeats the doctrine of the master's exemption from liability to one servant for negligence of another. The first of these has been overruled in the same State. "The action cannot, therefore, be maintained for the negligence of the engineer man in running his engine too fast, or in not giving notice of its approach." This decision has never, so far as we can find, been questioned or overruled by the court rendering it. The subsequent case of Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184, though decided only a year later, does not mention it. Certainly it does not overrule it in terms, and we think the cases are not in conflict. They simply treat of the relation of the master to the servant under different conditions. In the Ross Case, the Supreme Court of the United States declined "to lay down a rule which would determine, in all cases, what was to be deemed a common employment;" but placed its decision on the ground that "the conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, porters, and other subordinates." "He is in fact and should be treated as the personal representative of the corporation for whose negligence it is responsible to its subordinate servants." So that while the learned judge who wrote that opinion discusses with marked ability what is now sometimes termed "the department rule," it seems not to have been the basis of the decision in that case.

In the subsequent case, in the same court, of Quebec Steamship Co. v. Merchant, 10 Sup. Ct. Rep. 397, it appeared that the plaintiff was the stewardess of the ship. It was her duty to attend to the ladies' room in the cabin, and in the course of that duty to empty slops, as to which her orders were to throw them over the side of the vessel. The cabin was on deck. A railing extended round the vessel, and consisted of four horizontal iron rods, which were supported by stanchions at intervals of 4½ feet. In this railing there were openings or gangways for receiving and discharging freight and passengers. Three of the gangways were for passengers. On her voyage, at one of her stopping places, the gangway was opened to let off passengers. In replacing the rods, they were not placed in proper positions, but remained so far unfastened that the hooks were not secured in the eyes. The carpenter and porter undertook to fasten the rods. The porter testified he told the carpenter of the ship to put the rods in, and he replied, "Wait until the rain is over." While in this condition, the plaintiff came to the gangway with a bucket of slops, leaned against the railing, it gave away, and she fell into the sea, and was injured. The servants were divided into "three departments," the "deck department," the "engineer's department," and the "steward's department." The carpenter was in the deck department, the plaintiff in the steward's. There was a master or captain in command of the whole vessel. The court, Judge Blatchford delivering the opinion, says: "The contention of the plaintiff is that, as the carpenter was in the deck department and the stewardess in the steward's department, those were different departments, in such a sense that the carpenter was not a fellow-servant with the stewardess. But we think both the porter and carpenter were fellow-servants of the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter." The division into departments was one of convenience of administration. "The case, therefore, falls within the well-settled rule, as to which it is unnecessary to cite cases, which exempts an employer from liability for injuries to a servant caused by another servant." The plaintiff took upon himself the natural and ordinary risks incident to

the performance of her duty, and among such risks was the negligence of the porter and carpenter, or of either of them, in the course of the common employment." "There was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant than the employment of the stewardess made her such representative." In Murray v. Railway Co., 98 Mo. 573, 12 S. W. Rep. 252, this court held that the gripman of a cable car, employed upon it in operating it, was a fellow-servant of a watchman of the company, whose duty it was, from his station on the ground, to keep watch of cars as they approach a curve, and give signals to the gripman to prevent more than one train from passing the curves at a time. They were employed in the same "common employment of operating the cars; one from the car, the other from his station on the ground." The learned judge who wrote the opinion in that case very clearly distinguishes those cases in this State in which it was the duty of the master to furnish reasonably safe instrumentalities for his servants from those in which injury occurred by the act of a fellow-servant. He concludes by saying: "The majority of the courts, it is believed, hold that servants are in a common employment when they are engaged under the same master in the same general business." As in that case the gripman and the watchman were engaged in the common employment of operating the train, so in this case the crew and men in charge of this construction train, and the plaintiff's husband and the section gang to which he belonged, were engaged in the common employment of repairing and making safe and secure the track of their employer, the defendant herein, on a common section. So that, if we apply the general rule in this case, unquestionably they were fellow-servants; or if we apply "the department rule," as interpreted by the Supreme Court of the United States in the Randall Case and the Quebec Steamship Case, *supra*, they are fellow-servants, in the same department,—that of the construction and repairing of the defendant's track on this section. But neither the general rule nor the rule requiring a consociation of the employees would justify the judgment in this case. These train men on the construction train were daily hauling and delivering stone on the section on which plaintiff's husband worked, and had worked for three or four years. This train passed the working place of plaintiff's husband at least four times a day. He was required to get off the track for its passage each time. He could readily observe whether the engineer was in the habit of giving signals as he came and went, and whether he ran his engine so fast that it imperiled the safety of the section hands. This construction train and the section men belonging to the same department, that of construction and repair of the track. This train necessarily brought the work of the section and the construction crew daily in contact, so that this section gang could have observed and reported to the road-master any dereliction of duty in this regard. As remarked by this court in Marshall v. Schricker, 63 Mo. 308, "it would be carrying the rule to an absurd extreme to hold that those only are fellow-servants who are employed in doing precisely the same thing." The rule has never been circumscribed in any such a narrow circle. We cannot think of any danger more obvious or likely to happen to a section man than the danger to be apprehended from irregular trains. It was the most ordinary incident to his employment. This seems to have been fully understood by the men. Plaintiff's witness Hudgens says: "All section men are expected to watch and get off the track when the trains come. Trains never stop to give us time to get off." "We are expected to look out for all trains." And to the same effect is the evidence of Henry Hudgens, Joseph Dawson, and M. J. Barry. The risk was one he assumed when he went to work on that section. We think the demurrer to the evidence should have been sustained. The court, having overruled the demurrer to the evidence, should have given defendant's fifth instruction. The evidence clearly made them fellow-servants, and it was the court's duty to declare the law. As this disposes of the case, it is unnecessary to examine the other assignments of error.

Sherwood, C. J., and Macfarlane, J., concur, and are of opinion, with myself, that the judgment should be simply reversed; but in order to a disposition of the cause, and for that reason alone, we consent that the case be remanded. Sherwood, J., in a concurring opinion, and Black, J., in a separate opinion, hold the judgment should be reversed and the cause remanded. Barclay, Brace, and Thomas, JJ., dissent. Judge Thomas files a dissenting opinion, in which Judge Brace concurs in the conclusions reached. Barclay, J., dissents for reasons given by him in Dixson v. Railroad Co., 19 S. W. Rep. 412, in division No. 1, at this term.

The judgment is accordingly reversed, and the cause remanded.

NOTE.—The Supreme Court of Missouri has of late been called upon frequently to decide the question as to who are fellow-servants within the law relieving the master from liability for the death of a servant resulting from the negligence of another servant in the same common employment.

In Dixon v. Chicago & Alton R. Co., 35 Cent. L. J. 41, it was held that a laborer working in the quarry of defendant, a railroad company, under direction of a foreman, having no connection with the train service, the quarry being contiguous to the railroad track, was not a fellow-servant of the employees operating a passenger train on defendant's lines.

In Relyea v. Kansas City, F. S. & G. R. Co., 19 S. W. Rep. 1116, it was held that where a brakeman, in violation of his duty, failed to set the brakes on cars left on the main track while other cars were being side-tracked, and the unsecured cars ran down a grade and collided with an approaching train, killing a fireman thereon, the company is not liable for the death, the brakeman being a fellow-servant.

In Schlereth v. Mo. Pac. R. Co., 19 S. W. Rep. 1134, it was held that the engineer of a railroad train and a track repairer employed on the same road are not fellow-servants. About the same time came the decision of the principal case herein, Parker v. Hannibal & St. J. R. Co., where it was held, as will be observed, that a track repairer is a fellow-servant with those engaged in operating a rock train upon the road. The statement of these cases reveals somewhat the confused condition of the law as laid down by the Supreme Court of Missouri upon the subject. In the Parker case Thomas, J., dissented in a vigorous opinion. He reviews the cases both in the Missouri and other courts upon the subject, and claims that the Sullivan case, 97 Mo. 113, should be the controlling authority in the present case. In the Sullivan case it was announced that a track walker on a railroad is not a fellow-servant of a locomotive engineer or fireman of a passenger train. This, he claims, in effect overrules the Rohback case. And in the determination of the question now under review, he says that the court must affirm the doctrine of the Sullivan case or overrule it and go back to the principle announced in the Rohback case. This alternative being presented, he feels at liberty, he says, to resort to general principles, and as he regards the Sullivan case as in line with the spirit and tendency of the development and evolution of the law of fellow-servants in Missouri and in many other States of the Union, to overrule it now would be taking a step in the wrong direction. Judge Black, though concurring in the decision of the court in the principal case, in effect dissents from its conclusion, for, after a very clear and lucid statement of what he thinks the law is on the subject, he concludes by saying that, applying the conclusion before stated, the deceased and the men employed in operating the rock train were not fellow-servants within the rule of exemption. His concurrence was simply because the plaintiff herein failed to disclose a certain state of facts, *i. e.*, that the two gangs were independent of each other and had distinct foremen, which would take Parker out of the general rule as to fellow-servants. Judge Barclay also dissents. Grounding his opinion upon the view of the court in the Dixon case, he very properly says that the present case comes closer than the Dixon case did to the doubtful line, but yet appears to involve the same general principles there touched upon.

We refer the reader to a communication following this note, which contains some interesting comments upon this muddled question.

WHAT IS THE LAW IN MISSOURI AS TO WHO ARE FELLOW-SERVANTS?

The above question is doubtless a prominent one in the thoughts of a great many Missouri lawyers. Before the decision of the Supreme Court of Missouri in the late cases of Relyea v. Railroad Co., 19 S. W. Rep. 1116, and Parker v. Railroad Co., 19 S. W. Rep. 1119, the bar of the State doubtless felt secure in the belief that at least one important feature of the law of fellow-servants was settled, *i. e.*, that two persons working in a common service, but under the supervision of different persons, were not fellow-servants. We state the above proposition specially, but others will be involved in the cases reviewed. This later doctrine grew partly out of a keen sense of the injustice of the opposite or strict rule as expressed by Judge Wagner in Rohback v. Railroad Co., 43 Mo. 187, in which he declares that were the question a new one to this court, he would hesitate long before he would follow the rule in the leading case of Farwell y. Boston & W. R. R., 4 Metc. 49. It is doubted very seriously if the doctrine of that case would have become so deeply rooted in American jurisprudence if any other than Chief Justice Shaw had written the opinion of the court. He was looked upon by the American Bench and Bar as the mentor of the legal profession (and not without reason), and it rarely ever occurred to any court to question one of his decisions. The point was first raised in Missouri in McDermot v. Railroad Co., 30 Mo. 115, and was afterwards cited and followed in Rohback v. Railroad Co., 43 Mo. 187, and we doubt if the diligent reader will find any other well-considered case which approves the doctrine of these cases as a whole until the case of Relyea v. Railroad Co., 19 S. W. Rep. 1116, was decided. As was said before, the Supreme Court flinched at the strict rule in the Rohback case and dodged it in the case of Gibson v. Railroad Co., 46 Mo. 163, for that case could have been consistently disposed of under the authority of the McDermott and Rohback cases, but the court decided the case on the ground that the company was bound to be diligent in selecting competent employees and in furnishing safe appliances, and it had failed in that duty. While the question of fellow-servants was fairly raised in that case, the court evaded it. The point next came up in Lewis, Admr., v. Railroad Co., 59 Mo. 495, and it fell to Judge Wagner to write the opinion of the court. It will be remembered that he sidetracked the question of fellow-servants in the Gibson case, but it seems that when this Lewis case came before the court there was no longer any pretext to avoid the question, and the court decides the case and tacitly overrules the McDermott and Rohback cases as to the law of fellow-servants, and the decision in the Lewis case, so far as we are able to discover, has never been questioned. Indeed, Judge Henry, in a very well-considered opinion in Hall v. Railroad Co., 74 Mo. 298, declares that the Lewis case fairly turned the current, and that it was the law at that time. The Lewis case has been followed as authority in the cases of Long v. Railroad Co., 65 Mo. 225; Hall v. Railroad Co., 74 Mo. 298; Condon v. Railroad Co., 78 Mo. 567; Sullivan v. Railroad Co., 97 Mo. 113; Dickson v. Railroad Co., 19 S. W. Rep. 412; Parker v. Railroad Co., 19 S. W. Rep. 1119; Schlereth v. Railroad Co., 19 S. W. Rep. 1134. It will be observed that we place the Parker case in the category of the Lewis case, yet a casual glance at that case will lead to the impression that it decides to the contrary, and indeed Judge Gantt says that the majority of the court still approve the Rohback case. Now, the observant reader will notice that a majority of the court includes Judge Black, and by a careful reading of his special concurring opinion in that case, it will doubtless appear that he does not approve of the Rohback case, for he distinctly says that if, in the case in hand, the injured party was working under the superintendence of a person other than the foreman of the party whose negligence caused the injury, they were not fellow-servants. We fail to find a panacea in that declaration that would build up the broken down constitution of the Rohback case.

If the reader does not wish to take our view of the *status* of the Parker case, let him read Judge Macfarlane's opinion in the Schlereth case immediataly following, in which he refers to Judge Gantt's opinion in the Parker case as the "dissenting" opinion. Our "dissenters" are usually found marshalling the minor-

ity of the court. In the opinion of the court in the Parker case, in which it was undertaken to follow the Rohback case, Judge Gantt cites as authority to sustain his view, and presumably that of the court, the following cases: McDermott v. Railroad Co., 30 Mo. 115; Rohback v. Railroad Co., 43 Mo. 187; McGowan v. Railroad Co., 61 Mo. 528; Brothers v. Carter, 52 Mo. 372; Gibson v. Railroad Co., 46 Mo. 163; Marshall v. Schrieker, 63 Mo. 308; Smith v. Railroad Co., 92 Mo. 359; Sherrin v. Railroad Co., 103 Mo. 378; Murray v. Railroad Co., 98 Mo. 573; Schaub v. Railroad Co., 16 S. W. Rep. 924; Higgins v. Railroad Co., 104 Mo. 413; Relyea v. Railroad Co., 19 S. W. Rep. 1116.

Now let us briefly review these cases. Beginning with the Gibson case, which we have already noticed, we pass to the Brothers case. The report of that case shows that the injury was caused by defendant's *alter ego*, where the rule was easily applied, and the point involved in the Parker case was not in the case, that we can discover.

The McGowan case was decided on the theory that the conductor in charge of a gang of men on a construction train was *prima facie* the fellow-servant of those men; such a presumption would hardly be indulged now.

In the Marshall case the report shows that there was no evidence in the case to show that the foreman of defendant had any control over the plaintiff, but was a stranger to his department of service; besides, it was a "horse case," anyhow, so that the Parker case was not on "all fours" with it at all.

The Smith case was, it seems, a case where a fireman was killed through the negligence of a train dispatcher, and the court held that they were not fellow-servants. We fail to find anything in this case to bolster up the Rohback case, the court declaring the train dispatcher an *alter ego*.

The Sherrin case is clearly not an analogous case, in which one foreman of a section gang was injured by another foreman of a section gang. Both of them occupied the same *status* toward the common road-master.

The Higgins case was one in which a laborer on a construction train was killed through the negligence of the engineer of the same train, both of whom were under the control of the conductor of the train. It seems to us that the court was evidently hard pressed to extract any authority from this case to sustain its purpose.

In the Murray case it is hard to draw a parallel with the railroad cases, especially for the reason that a street railroad has not the same system of foremanship that the railways have; yet were the same facts to recur in another case, we doubt if the Murray case would be upheld, as it would perhaps be elicited that there was a superintendent of trackmen (including watchmen), and a superintendent of car service, which would, under the ruling of the Schlereth case, the latest on the subject, remove the exemption.

The Schaub case, which was so confidently relied upon by Judges Macfarlane and Gantt in the Relyea and Parker cases as sustaining the strict rule, was a case, the opinion of which was lengthily written by Judge Gantt. In that case he says that the record does not show who were directly instrumental in bringing about the injury, and that the evidence was not explicit as to who caused it; then proceeds to lay down the law of fellow-servants! The court wound up the decision by remanding the case for a new trial, principally under the issue of contributory negligence.

The Relyea case was decided by Division No. 2, which is made up of two avowed followers of the rule in the Rohback case and one of the contrary opinion, and such a result as was reached was to be expected. It must not be taken for granted that we claim that all that was laid down as law in the McDermott and Rohback cases has been departed from in this State. On the contrary, much that was decided in those cases is law at this time, and while we have not made an examination to ascertain, yet we have no doubt but that these cases have been cited with approval in many (perhaps most) of the cases cited by us as maintaining a different theory as to who are fellow-servants. But it must not be supposed that when the court cites the Rohback case to sustain the rule that a railroad company must furnish safe appliances it intended to swallow the case whole. In nearly all cases, as is well known, there are a number of distinct points of law settled, yet afterwards, when one of these particular points is raised, the sustaining case is cited as a whole.

We would call especial attention to Judge Sherwood's hypothetical case in the Parker case, in which he says that if he should employ one man to haul manure on his farm and another to scatter it, and one should injure the other, no court would declare that they were other than fellow-servants, and then declares that that state of facts is similar to the case in hand, but we fail to note the similarity. In examining that opinion it will doubtless occur to the logical mind at a flash that it is but a step from the hauler and scatterer to the common employer, and it was never supposed, so far as we can find, that they were ever considered other than fellow-servants under similar circumstances. There must have been some "straws" in that manure that the learned judge was catching at. The court, as is well known, is composed of three "strict constructionists" and four who adhere to the contrary rule as to fellow-servants; and while the whole court concurred in the Schlereth case, no one doubts but that the minority were convinced against their will, and consequently are "of their opinion still," otherwise they would have gone on and made a day of it, and overruled the Rohback and Relyea cases and closed the question for all time as to the present membership of the court.

So that in recapitulation we ask: "What is the law on the subject?" there being a number of thoroughly considered cases deciding the matter both ways, no one of which has been declared overruled.

W. D. JAMESON.

Kansas City, Mo.

CORRESPONDENCE.

NEGLIGENCE IN USE OF DANGEROUS INSTRUMENTALITIES.

To the Editor of the Central Law Journal:

The recent decision of Heizer v. Kingsland, etc. Co., by the Supreme Court of Missouri, reported in your August 5 number, would seem to merit the criticism made by Mr. Murfree in his note thereto. In neither the decision or note is there any reference made to the case of Shubert v. Clark Co., 51 N. W. Rep. 1103, in which the Supreme Court of Minnesota would seem to have laid down a principle of law antagonistic to the holding by the Missouri court. In the Minnesota case a manufacturer sold a ladder which had a defect concealed by paint, and the court held the company liable to third person injured by the breaking of the ladder, notwithstanding he had no con-

tractual relations with the manufacturer, and into whose hands it had come in the usual course of business. Certainly one of the courts has failed to lay down good law, but for once the Minnesota court would seem not to have ranged very far from reason and justice. THOMAS KNEELAND.

LIABILITY OF CITY FOR NEGLIGENT ACTS OF FIREMEN.

To the Editor of the Central Law Journal:

In a late issue (No. 3, Vol. 35) of your valuable journal I read with much interest the decision and note in case of Dodge v. Granger, where the responsibility of a city for negligent acts of its firemen is discussed. In addition to the cases cited in the note, I would call your attention to Gillespie v. City of Lincoln, a late decision of the supreme court of this State (Nebraska) on the same question, and which follows the prevailing rule. H. J. WHITMORE.

BOOK REVIEWS.

BLACK ON INTOXICATING LIQUORS.

The author of this work has become quite well known to the profession as the author of several meritorious treatises. The subject of which this book treats is eminently practical, and is of more or less value in all the States. It purports to be and is a legal treatise upon the law applicable to the sale of intoxicating liquors, and, as the author says, is "not a plea for any particular system of liquor legislation." The scope of the book may best be indicated by a statement of the subjects of its chapters: 1. Definitions and construction of terms; 2. General theory of the police power; 3. Constitutionality of the liquor laws; 4. Liquor legislation and the regulation of commerce; 5. Prohibition; 6. Local option; 7. Taxation of the liquor traffic; 8. The licensing system; 9. Regulation of sales by druggists and physicians; 10. Regulation of liquor traffic by municipal corporations; 11. Laws against adulteration of liquor; 12. Effect of liquor laws on contracts and rights of action; 13. Civil damage laws; 14. Injunction and abatement of liquor nuisances; 15. Search and seizure laws; 16. Criminal responsibility under the liquor laws; 17. Crimes and offenses under the liquor laws; 18. Illegal sales of liquor as criminal offenses; 19. Indictments under the liquor laws; 20. Evidence in prosecutions under the liquor laws; 21. Procedure in liquor cases.

It will thus be seen that the author has, within the limits of this work, comprehended the substantial points or questions arising under the law of intoxicating liquors. We have had occasion before to speak of the terse, clear language used by the writer of this work, and the conscientious manner in which he prepares his matter. The present work seems to have been prepared in the same manner, the citations being exhaustive and the text carefully written. The work contains 700 pages, well printed and bound, and is published by the West Publishing Company, St. Paul.

LEWIS' FEDERAL POWER.

The author states that in writing this work he was strongly imbued with two ideas. First, that no principle relating to interstate commerce can be said to be a part of our constitutional law until it has been made the basis of a decision in the Supreme Court of the United States. He has therefore confined himself in the text to a discussion of the decisions in that tribunal. Second, the importance of the historical development of the subject. He has therefore endeavored to trace through the decisions of the supreme court the origin, growth and modification of every principle of constitutional law relating to the federal power over commerce, and its effect in curtailing the legislative action of the States. The work treats in successive chapters of the following subjects: 1. The term "commerce" and the extent of the power granted to congress; 2. The nature of the federal power over commerce; 3. The effect of the federal power over commerce on the general legislative power of the States; 4. The effect of the federal power over commerce on the State power of taxation; 5. The effect of the federal power over commerce on the State police power; 6. The doctrine of the silence of congress. It will be seen that the book is a modern one and within modern lines. It is readable as giving one a clear presentation of the leading questions which have arisen of late regarding the interpretation of the federal constitution as connected with the subject of interstate commerce. The author is William Draper Lewis, a prominent member of the Philadelphia Bar, and is written in clear and concise language. It contains 750 pages.

HUMORS OF THE LAW.

A justice of the peace who was constantly trying criminal cases was called upon to marry a couple. After he had asked the usual question, if they desired to be united in the bonds of matrimony, and they had replied in the affirmative, the justice said solemnly: "Having pleaded guilty to the charge, if there are in your opinion any mitigating circumstances, now is the time to state what they are.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION— Sale of Land—Fraud.—Where it is claimed that an administrator's sale of real estate, which has been confirmed, and a deed executed, was fraudulent, the facts constituting the alleged fraud should be set forth in a petition sworn to positively. — LANDER V. ABRAHAMSON, Neb., 52 N. W. Rep. 571.

2. ADMINISTRATION — Sale of Lands.— It is not necessary to state, in an order to show cause why a license should not be granted an administrator to sell the lands of his intestate to pay the debts of the estate, the names of the heirs or other interested parties. The order is sufficient to confer jurisdiction over the per-

son if it directs "all persons interested in the estate" to appear at the time and place named in the order.—STACK v. ROYCE, Neb., 52 N. W. Rep. 675.

3. ALIMONY—Judgment—Counterclaim.—In a divorce proceeding the husband cannot set up as a counterclaim an indebtedness of the wife to him when she asks for alimony pending the litigation, and hence he will not be barred from setting up such counterclaim in a subsequent suit, brought by an assignee of the wife on a judgment granting such alimony.—PARKER v. ALBEE, Iowa, 52 N. W. Rep. 533.

4. APPEAL — Notice. — Under Code, § 3178, which declares that "an appeal is taken by the service of a notice on the adverse party, his agent or attorney," a notice of appeal which, after giving the names of the parties, is addressed "To the above-named plaintiff, or to W. H. Stivers, his attorney," and which is duly served on said attorney, is sufficient.—BRUNER v. WADE, Iowa, 52 N. W. Rep. 558.

5. ASSAULT AND BATTERY—Damages.—Where the evidence in an action for assault showed that it was brutal and unwarranted, the damages should embrace reasonable expenses for medical treatment, the reasonable value of the time lost, and such sum as would fairly compensate plaintiff for physical pain.— MARTIN v. MURPHY, Iowa, 52 N. W. Rep. 662.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment for the benefit of creditors, as it secures an equitable distribution of the proceeds of the debtor's property among his creditors, will be sustained, if possible.— LANCASTER COUNTY BANK v. HORN, Neb., 52 N. W. Rep. 562.

7. ATTACHMENT — Priority. — Under Mansf. Dig. § 325, providing that an order of attachment binds defendant's property "from the time of the delivery of the order to the sheriff or other officer," the lien of an attachment which is first placed in the sheriff's hands is prior to that of one subsequently delivered to him, though the latter was levied first.—GREGORY v. ADLER, Ark., 19 S. W. Rep. 921.

8. ATTACHMENT AGAINST PARTNERS — Minor.— Where two partners were sued for a partnership debt, and an attachment was issued against both, and was levied on partnership property, and one defendant pleaded in abatement, and the finding thereon was in his favor, and the other failed to plead, the trial court erred in abating the attachment as to both defendants, as it should have been abated only as to the partner pleading.—HILL v. BELL, Mo., 19 S. W. Rep. 959.

9. BOND OF DEPUTY SHERIFF.—A deputy sheriff is required to give a bond for the same amount as his principal, and the bond of such deputy must run to the county in which he was appointed.—RIGGS v. MILLER, Neb., 52 N. W. Rep. 567.

10. BUILDING ASSOCIATION—Usury.—There can be no usury in a building association mortgage which expressly stipulates that the borrower shall not pay more than the legal rate of interest.—TAYLOR v. VAN BRUEN BLDG. & LOAN ASS'N, Ark., 19 S. W. Rep. 918.

11. CARRIERS — Contracts. — Where contractors construct a free gravel road under a contract with the board of county commissoners, and at the request of the board and engineer perform extra services, the board cannot resist an action for the price of such services on the ground that it had no authority to change the contract. — BOARD OF COM'RS OF HAMILTON COUNTY v. NEWLIN, Ind., 31 N. E. Rep. 465.

12. CERTIORARI — Pleading. — Where proceedings to tile a drain or remove to the circuit court by *certiorari*, and the name of the party in whose interest the affidavit for the writ purports to be made nowhere appears in the return thereto, and the affidavit does not set forth that such party is liable to assessment for the expense of the work, or that he has any interest to be affected by the proceeding, the writ was properly dismissed. — MORSE v. WILLIAMS, Mich., 52 N. W. Rep. 629.

13. CONSTITUTIONAL LAW — City Fire Limits — Ordinances.— Where a person, under permit granted by a city council to erect frame buildings within the fire limits, has made contracts, and incurred liabilities thereon, before a rescission thereof, he acquires a private property right, of which he is entitled to protection.— CITY OF BUFFALO v. CHADEAYNE, N. Y., 31 N. E. Rep. 443.

14. CONSTITUTIONAL LAW — County Treasurers—Malfeasance.— Under section 2, art. 13, of the constitution, the legislature has authority to vest the power of removing inferior officers in the governor. — STATE v. PETERSON, Minn., 52 N. W. Rep. 655.

15. CONSTITUTIONAL LAW — Inspection—Illuminating Oils.—By section 4, ch. 246, Laws 1889, providing for the inspection of illuminating oils in tank railroad cars, the legislature intended the inspection to be made in such tank cars, without reference to the will of the owner.— WILLIS v. STANDARD OIL CO., Minn., 52 N. W. Rep. 652.

16. CONTRACT — Agreement of Creditors.— An agreement between creditors not to sue the debtor without the concurrence of a majority of the creditors does not accrue to the benefit of the debtor, and he cannot plead it as a bar to an action against him by one of the creditors.— JOHNSON v. BAMBERGER, Ark., 19 S. W. Rep. 920.

17. CONTRACT — Pleading.— In an action on a written agreement, purporting to be signed by defendant through his agent, the plea of the general issue admits the execution of the contract, and that the signature of defendant was duly authorized.—INGLISH v. AYER, Mich., 52 N. W. Rep. 639.

18. CONTRACT — Damages. — Where the contract for a job of printing did not require plaintiff to purchase therefor a new printing press, in an action for a breach of the contract, plaintiff cannot recover damages on account of the purchase of such press, though defendant, after making the contract, requested plaintiff to purchase it.—ST. LOUIS, A. & T. RY. CO. v. BEARD, Ark., 19 S. W. Rep. 923.

19. CONTRACT — Parol Evidence. — Where a written agreement for the sale of an interest in an hotel, and the joint operation of the hotel provides, without ambiguity, for the payment of a certain sum in a certain time for the interest so sold, it is not competent to show by parol that it was understood the payment was to be made out of the profits of the business, or in any other manner not specified in writing. —SMITH v. KEMP, Mich., 52 N. W. Rep. 639.

20. CONTRACT— Subscriptions—Conditions.—In an action by a church corporation to recover money in the hands of the treasurer of a society organized by the church members in order to procure funds for furnishing a proposed new church building, the defense was that the money was contributed on the condition, which was not complied with, that the building should be located at a certain place: Held, that defendant (treasurer of the society) was properly permitted to testify that she contributed with the understanding that the location had been determined on at the time the society was organized, and to state what others told her as to their understanding.— FIRST M. E. CHURCH OF BURLINGTON v. SWENY, Iowa, 52 N. W. Rep. 546.

21. CORPORATION — Change of Name. — Under Act March 26, 1872, § 1, which declares that, "in changing the name of any corporation, no name shall be adopted similar to the name of any other corporation organized under the laws of this State," a corporation cannot change its name so to adopt a name used by a corporation which, though not fully organized, has received its license for incorporation, even though such license was obtained after the directors of the former company had called a meeting to vote on the proposed change of name, and had published notice of such meeting.— ILLINOIS WATCH CASE CO. v. PEARSON, Ill., 31 N. E. Rep. 400.

22. CORPORATIONS — Insolvency — Wages.— Although considerable manual labor is involved in the business

of inspecting lumber, in measuring and ascertaining the quantity and quality of logs, it is not that, so much as their judgment and integrity, which commands the compensation paid inspectors; and they are not wage earners, within the protection of Laws 1887, Act 94, which makes all debts owing for labor by a person or corporation at the time of becoming insolvent preferred claims against the estate.—IN RE SAYLES, Mich., 52 N. W. Rep. 637.

23. CORPORATIONS—Issuance of Stock.—A corporation can issue its stock only by directions of the corporation, and, unless there are stipulations in its charter to the contrary, its stockholders are entitled *pro rata* to a preference in the purchase of the new stock.—HUMBOLDT DRIVING PARK ASS'N V. STEVENS, Neb., 52 N. W. Rep. 568.

24. CORPORATIONS — Preferences— Wages.—A person, who, while laboring himself, employs men, several teams owned by himself, and other hired teams in performing a contract with a firm, is not a wage earner, within the protection of Laws 1887, Act 94, providing that all debts owing for labor by any person or corporation at the time of becoming insolvent shall be preferred claims against the estate. — IN RE CLARK, Mich., 52 N. W. Rep 637.

25. COURT—Jurisdiction.—On an appeal in an action for the recovery of the possession of specific personal property, the appellate court has jurisdiction notwithstanding that, between the filing of the complaint and the rendition of judgment, a third person intervenes as a party defendant claiming an equitable lien on the property.—SMITH V. DOWNEY, Ind., 31 N. E. Rep. 449.

26. CRIMINAL LAW—Assault.—In an action for an assault to do great bodily harm the court did not err in refusing to charge that the jury must find a specific intent to assault the prosecuting witness, and in charging that, if defendant shot into a crowd with the intention of wounding any of them, he might be convicted.—PEOPLE V. RAHER, Mich., 52 N. W. Rep. 625.

27. CRIMINAL LAW—Changing Name of Witness on Information.—In a prosecution for felony, after the witness had been sworn, the prosecuting attorney asked and obtained leave to make a correction in the name of such witness by changing the initials of the Christian name from C A. to H. C.: Held, that the prosecuting attorney should be required to show that he was not aware of the mistake until that time, and that, if the accused should make it appear that he was misled, the court should continue the case to a later day in the term.—BINKLEY V. STATE, Neb., 52 N. W. Rep. 708.

28. CRIMINAL LAW—Larceny.—An indictment charging defendant with stealing and carrying away on a certain day a certain number of bags of flax belonging to one person and a certain number belonging to another person, all being at the time and place in the possession of one of the owners, does not charge more than one offense.—STATE V. LARSON, Iowa, 52 N. W. Rep. 539.

29. CRIMINAL LAW—Murder—Corpus Delicti.—On trial for murder where the crime charged was accomplished by poison, the *corpus delicti* may be proven by circumstantial evidence, and it is enough to show that poison was immediately at hand, in the house in which defendant lived, in a cabinet usually unlocked, and within her easy and immediate reach, and that she was aware of such facts.—ZOLDOSKE V. STATE, Wis., 52 N. W. Rep. 778.

30. CRIMINAL LAW—Witnesses.—Under Code, § 4421, which provides that the county attorney shall not introduce witnesses on a trial who had not been examined before the grand jury, unless he shall have given defendant written notice stating the name of the witness, and the "substance of what he expects to prove by him on the trial," on an indictment for nuisance a notice that the State expected to prove by the witnesses named in the notice that the nuisance had been kept and maintained by defendant, as charged in the indictment, was insufficient.—STATE V. KREDER, Iowa, 52 N. W. Rep. 658.

31. CRIMINAL PRACTICE—Assault—Autrefois Acquit.—Where a person makes a murderous assault on another with a pistol, and in the struggle to disarm the assailant the weapon is discharged, and a third person killed, an acquittal of the murder of such person is no bar to a subsequent indictment for an assault with intent to kill the person who was first attacked.—WINN V. STATE, Wis., 52 N. W. Rep. 775.

32. CRIMINAL TRIAL—Testimony of Accused.—On trial for murder, after testifying in his own behalf, defendant requested an instruction that the jury were the sole judges of the credibility of his testimony, and that they should judge and weigh it as they would that of other witnesses; which the court gave, adding that the jury should also consider defendant's interest: Held, that the addition was erroneous, as singling out and instructing upon the evidence of a particular witness, and as a charge on the weight of evidence.—MUELY V. STATE, Tex., 19 S. W. Rep. 915.

33. DEED — Acknowledgment.—A certificate of acknowledgment to a deed which states that "personally came Catherine Tozier to me known to be the identical person whose name is affixed to the above instrument as grantor, and acknowledged the same to be her voluntary act and deed," which certificate is signed by an officer authorized to take acknowledgments, and attested with his official seal, held valid.—GREGORY V. KENYON, Neb., 52 N. W. Rep. 685.

34. DEED—Delivery.—An old man executed a deed conveying certain land to his minor nephews and nieces, and reserving a life estate in himself. He handed the deed to a third person, who kept it until after his death, when, at the instigation of his sole devisee, it was given to his widow, and by her destroyed. The grantor had said that he wanted the deed kept for the children: Held, that the delivery was sufficient to pass title.—DOUGLAS V. WEST, Ill., 31 N. E. Rep. 403.

35. DEED—Reservation—Right of Way.—A reservation in a deed of a "reasonable right of way across the land" conveyed does not entitle the owner of the dominant estate to inclose a right of way with fences.—SIZER V. QUINLAN, Wis., 52 N. W. Rep. 590.

36. DESCENT AND DISTRIBUTION—Husband and Wife.—On the death of a wife leaving a will making provision for the husband inconsistent with his statutory rights to take one-third of the fee of the lands of which she died seised (Rev. St. 1881 § 2485), he may abandon his statutory rights, and take in lieu thereof under the will.—CLARK V. CLARK, Ind., 31 N. E. Rep. 461.

37. DIVORCE—Alimony.—Though Gen. St. ch. 52, art. 3, § 6, authorizes an allowance to the wife out of the husband's estate when a divorce is obtained by her, and not when obtained by him, nevertheless she may be entitled to an allowance, not having sufficient estate of her own, if a divorce has been improperly granted to him instead of to her.—GAINS V. GAINS, Ky., 19 S. W. Rep. 928.

38. DOWER.—Rev. St. 1881, § 2491, provides that a surviving wife is entitled to one-third of all the real estate of which her husband was seised during coveture, in a conveyence of which she had not joined: Held, that a judgment against a husband and wife quieting title to land which had been owned by the former, but which prior to the action he alone conveyed, is binding on the wife after the husband's decease.—TANGUEY V. O'CONNELL, Ind., 31 N. E. Rep. 469.

39. DOWER—Election.—How. St. §§ 5824, 5825, giving a widow, under certain circumstances, the right to elect whether she will take under the statutes of distributions or under the will of her deceased husband, and providing that the election to take otherwise than under the will shall be in writing, and filed within a year in the court in which proceedings for the settlement of the estate are being taken, and that failure to file such election within the time specified shall be deemed an election to take under the will, do not prevent an election by the guardian of an insane widow, made

with the approval of the said court.—ANDREWS V. BASSETT, Mich., 52 N. W. Rep. 743.

40. DRAINAGE — Repairs. — Since drains constructed under Act March 9, 1875, were not especially constructed under the supervision of the commissioners charged with their establishment, the county surveyor was not obliged to wait until such drains were entirely completed before having them repaired, as commanded by Elliott's Supp. 1889, § 1193, but might take possession, for that purpose, of the completed portions.—ARTMAN V. WYNKOOP, Ind., 31 N. E. Rep. 468.

41. DRAINAGE ASSESSMENTS—Defective Description.—Where a complaint to enforce an assessment for drainage clearly shows the land intended to be benefited, and shows the mistake in the assessment describing it, the mistake may be corrected.—LUZADDER V. STATE, Ind., 31 N. E. Rep. 453.

42. EMINENT DOMAIN—Procedure.—In this State, the special remedy provided by statute for determining by condemnation proceeding the damage to land when a part thereof is taken for right of way purposes by a railroad company is exclusive.—FREMONT, E. & M. V. R. CO. V. MATTHIES, Neb., 52 N. W. Rep. 698.

43. EMINENT DOMAIN — What Constitutes Taking.—Where condemnation proceedings for land had been instituted by a railroad company, and then, as they might, been discontinued, a subsequent unintentional encroachment of its track thereon which was on discovery speedily set back, is a simple trespass only, and not a taking thereof.—MORRIS V. WISCONSIN MID LAND R. CO., Wis., 52 N. W. Rep. 758.

44. EQUITY — Dissolution of Corporation.—Where a bill is filed by a creditor of a corporation to dissolve the corporation and appoint a receiver, other creditors who, after a receiver has been appointed, intervene in the suit for the purpose of establishing an alleged priority in their favor, cannot complain of the validity of the decree appointing the receiver, since the relief claimed by them is subordinate to such decree.—COMMERCIAL NAT. BANK V. BURCH, Ill., 31 N. E. Rep. 420.

45. EQUITY PLEADING — Gaming Contract.—Rev. St. 1891, ch. 38, § 137, which provides that, in suits to set aside instruments executed in violation of the criminal law, complainant "shall be entitled to discovery as in other actions and all persons should be obliged and compelled to answer upon oath," does not prevent complainant, in a suit to set aside a gaming contract, from waiving an answer under oath.—PATTERSON V. SCOTT, Ill., 31 N E. Rep. 483.

46. ESTOPPEL—Representations.—Where one by his own words willfully causes another to believe in a certain state of facts, as by stating that he is not the owner of certain property, and thus induces him to act on such belief so as to alter his own previous position, as by purchasing the property, the former is concluded from afterwards averring against the latter a different state of things from what he then represented.—BLODGETT V. MCMURTRY, Neb., 52 N. W. Rep. 706.

47. EVIDENCE ILLEGALLY TAKEN IN ANOTHER ACTION.—Oral evidence, illegally taken, against objection, in the probate court, of a person who appeared there by counsel in answer to a summons of the administrator of an intestate estate, as to money and effects belonging thereto in his hands, and who claims an absolute assignment to him by intestate of a life insurance policy, is admissible as his declaration in a suit by the administrator to obtain a reassignment of the policy.—LILLEY V. MUTUAL BEN. LIFE INS. CO. OF NEWARK, Mich., 52 N. W. Rep. 631.

48. EXECUTORS— Power of Survivor.—How. St. § 5844, provides that "when all the executors appointed in any will shall not be" legally authorized to act as such, such as are authorized can perform every act and discharge every trust required by the will as effectually as if all were authorized and should act together: Held, where testator devised his property to three executors in trust, and empowered them or the survivors or survivor of them to pay or compromise incumbrances on his real estate, and one of the executors died shortly after testator, and another failed to qualify, that a deed executed by the remaining executor by which, in consideration of the cancellation of a mortgage on a portion of the trust estate, another portion thereof was conveyed, was valid.—HERRICK V. CARPENTER, Mich., 52 N. W. Rep. 747.

49. FALSE PRETENSES.—The allegation, in an information for obtaining money for a charity under false pretenses, that the person to whom the false representations were made was a member of the copartnership of which the money was fraudulently obtained, is sufficient to show the agency and authority to give in charity. — PEOPLE V. FITZGERALD, Mich., 52 N. W. Rep. 726.

50. FRAUD.—In trover for goods, the alleged property of plaintiffs' firm, sold under execution by defendants against J, claimed to be the firm's agent, defendants answered that the firm was in name only, a matter of convenience, and used to protect J from his creditors' claims: Held, that the burden of proof was on defendants to establish the fraud, that positive proof was not required, but it could be proven by circumstances from which the inference could be drawn.—FREEDMAN V. CAMPFIELD, Mich., 52 N. W. Rep. 630.

51. FRAUDS, STATUTE OF—Part Performance.— Where a husband deeds property to his wife upon the understanding that it is to be devised by her to a university, and the agreement is fully performed by both, and rests for a number of years, until the death of the wife, when the will is declared invalid the agreement is without the statute of frauds or the statute of trusts and uses, and may be evidenced by the declarations of the wife at the time, and letters written by the husband with her consent in regard thereto.—BARKER V. SMITH, Mich., 52 N. W. Rep. 722.

52. FRAUDULENT CONVEYANCE.—A transfer by an insolvent son to his father of less than his debt to him, made in pursuance of a demand by the father for payment without any intent to defraud creditors, is not void as to creditors whose claims arose prior to such transfer, though the son is permitted to remain in possession for a short time. — BARR V. CHURCH, Wis., 52 N. W. Rep. 591.

53. FRAUDULENT CONVEYANCE.—Rev. St. 1881, § 4921, provides that, "all deeds of gift, made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent:" Held, that a complaint by a subsequent judgment creditor to subject land to the payment of the judgment, which showed that defendant furnished his son the money with which to purchase the land, but failed to show that the land was conveyed to the son in trust for defendant, is bad on demurrer. — BRIGHT V. BRIGHT, Ind., 31 N. E. Rep. 470.

54. FRAUDULENT CONVEYANCE— Assignment.—A conveyance of land and bills of sale, being direct conveyances by a debtor to his creditor in payment of valid debts, are good against an attachment levied on such land and premises. — GOODBAR V. LOCKE, Ark., 19 S. W. Rep. 924.

55. GARNISHMENT.— In a garnishee proceeding, where it appeared that some months before the action was begun the principal defendant transferred to the garnishee certain notes, receiving part payment, and also left other notes with the garnishee for collection, but that before the commencement of the action the garnishee had paid the balance due on the notes so transferred, and had collected and paid over the money on the notes left with him for collection, and there is no evidence of fraud or bad faith, the jury were properly charged to find for the garnishee.—WILES V. LEE, Ind., 31 N. E. Rep. 474.

56. GARNISHMENT OF LEGACY.— Where, in a garnishment proceeding against an executor having in his hands money coming to the judgment defendant under her father's will, the amount thereof was not ascertainable until settlement of the estate, the executor

was not entitled to be discharged because of delay in taking his answer, as he was not thereby prejudiced, and could have himself at any time applied to have had his answer taken.—BOYER V. HAWKINS, Iowa, 52 N. W. Rep. 659.

57. GUARANTY—Extension of Time.—Where goods are sold on 60 days' time, on the guaranty of a third person to become responsible for payment, and the seller, without the consent of the guarantor take the purchaser's note, payable after maturity on the account, the guarantor is released from liability.—MANNING V. ALGER, Iowa, 52 N. W. Rep. 542.

58. HABEAS CORPUS.—A defendant in a criminal prosecution who had given bail for his appearance at the next term of court, and is thereby entitled to his freedom, is not entitled to the writ of *habeas corpus*, since he is not in custody, within the meaning of the statute. —SPRING V. DAHLMAN, Neb., 52 N. W. Rep. 567.

59. HIGHWAYS — Report of Viewers.— Under Rev. St. § 5016, which imposes on viewers the duty to ascertain whether a highway will be of "public utility," and to "lay out and mark" it "on the best ground" and under section 5017, providing for a report by such viewers giving a decription of such location "by metes and bounds," their report that they have "proceeded to review, mark, and locate the proposed highway," with a decription of the road, is sufficient, and they are not quired to state therein that the road will be of public utility, and is located on the best ground.—CAMPBELL V. FORGY, Ind., 31 N. E. Rep. 454.

60. HIGHWAY— Right of Appeal.—Under Laws 1887, p. 245, § 10, providing that, "in all cases of appeals being allowed from the judgment of the county court, assessing damages, or for opening, changing, or vacating any road, the circuit court shall be possessed of the cause, and shall proceed to hear and determine the same anew," an appeal from a judgment vacating a portion of a public road lies the circuit court.— IN RE BIG HOLLOW ROAD, Mo., 19 S. W. Rep. 947.

61. HIGHWAYS— Statutory Proceedings— Notice.—Under the statute, the county board, upon giving public notice through the newspapers, as required by law, and complying with the law in other respects, may locate a valid public road through the property of one or more of the land-owners, although he has no actual notice of the proceedings while they are pending.— PAWNEE COUNTY V. STORM, Neb., 52 N. W. Rep. 696.

62. HIGHWAY — Wrongful Opening. — The fact that supervisors of roads may be punished for contempt in disobeying a mandate to open up a highway established on a section line does not preclude a person from enjoining them from opening up the road across his land instead of along the section line.— KERN V. ISGRIGG, Ind., 31 N. E. Rep. 455.

63. INSURANCE— Assignment of Policy.—An insurance policy provided that if the property insured should be sold or conveyed, or if the policy should be assigned, without written consent, then the policy should be void. The insured sold the property and assigned the policy without the company's consent, whereupon the assignee sent the policy to an agent, who returned it unindorsed, explaining that he had no authority to authorize a transfer, and suggesting that the policy be sent to the general agent, who would indorse thereon the company's consent. It was accordingly sent to the general agent, who returned it unindorsed, without explanation, but the assignee, supposing it to be properly indorsed, made no examination of it: Held, that there was no contract of insurance with the assignee, and no liability on the policy.—NEW V. GERMAN INS. CO. OF FREEPORT, Ind., 31 N. E. Rep. 475.

64. INSURANCE — Cancellation. — Sanb. & B. Ann. St. § 1946*d* providing that, at the request of a party insured, the insurance company shall cancel the policy and return the unearned premium, and article 15 of the by-laws of a certain company giving the company the right to cancel any policy, and requiring it in case it does so to return the unearned premium, do not require the return of such premium where the policy has been determined by the insolvency of the company, but only where it has been determined at the request of the insured, or the express desire of the company.— DEWEY V. DAVIS, Wis., 52 N. W. Rep. 774.

65. INSURANCE—Premium Notes.—A provision in the articles of association of a mutual insurance company, which allows the insured to pay his whole insurance in cash, and so relieve himself from liability for further assessments, instead of giving a premium note, is not contrary to the principle of mutual insurance, but is equivalent to an assessment to the full amount of the said note at its inception. — DAVIS V. OSHKOSH UPHOLSTERY CO., Wis., 52 N. W. Rep. 771.

66. INSURANCE—Representations.— The provision of a fire insurance policy, that for any false representations or any omission to make known every fact material to the risk the policy shall be void, is not violated by the fact that some shelving affixed to the realty, and covered by a policy of insurance on a stock of goods and store furniture, was subject to a mortgage on the building, of which no mention had been made in the application, because both the insured and defendant's agent supposed that the mortgage did not cover such property.—CRITTENDEN V. SPRINGFIELD FIRE & MARINE INS. CO., Iowa, 52 N. W. Rep. 548.

67. INTOXICATING LIQUORS— Civil Damage Laws.—In an action against a liquor seller and his sureties on a bond given under Rev. St. 1891, ch. 43, § 5, conditioned for the payment of all damages sustained in person or property or means of support by reason of said principal defendant selling or giving away intoxicating liquors, where the declaration alleges the giving as well as the selling of intoxicating liquors, and there is some evidence to prove the giving of such liquors, it is proper to submit to the jury the question of the giving as well as of the selling of such liquors.—SMITH V. PEOPLE, Ill., 31 N. E. Rep. 425.

68. INTOXICATING LIQUORS—Sale by Druggist.—Under the act amendatory and supplemental of chapter 50 of the Compiled Statutes of 1885, entitled "Liquors," it is unlawful for any person to keep for the purpose of sale, without license, any malt, spirituous, or vinous liquors. Physicians or druggists having permits for the sale of liquors for medicinal, mechanical, chemical, or sacramental purposes are excepted from the operation of the act.—STATE V. CLOYD, Neb., 52 N. W. Rep. 579.

69. JUSTICE OF THE PEACE — Jurisdiction. — In a suit against an absconding debtor, where funds were garnished and service had by posting notices, the justice who issued the process resigned before the return day set in the notices, and some time after the return day a successor was appointed, who set a day for trial, and notified all the parties except defendant: Held, that he had acquired no jurisdiction of defendant; Code, § 3610, providing that the hearing must be on the day set in the notices.—EVANS V. RICHARDS, Iowa, 52 N. W. Rep. 541.

70. LEASE—Rent — Assignment. —A married woman gave a mortgage of her land, containing an assignment of the rents. Afterwards she rented the property and assigned the lease to the mortgagee: Held, that in a suit by the mortgagee for the rent, in which payment was the only defense pleaded, and in which the woman testified on behalf of the mortgagee, it was proper to refuse to instruct the jury as to the respective rights of mortgagors and mortgagees to the rents of the mortgaged premises, since that question was not in issue. — TRULOCK V. DONAHUE, Iowa, 52 N. W. Rep. 537.

71. LEASE—Assignment.—The assignment of a lease whose unexpired term is longer than a year is within the purview of Rev. St. ch. 56, § 2, which provides that no action shall be brought "upon any contract for the sale of lands, tenements, or hereditaments, or any interest in them for a longer term than one year, unless such contract, or some note or memorandum thereof, be in writing."—CHICAGO ATTACHMENT CO. V. DAVIS SEWING MACHINE CO., Ill., 31 N. E. Rep. 438.

72. LEASE — Cancellation.—A person entitled to the assessed value of a house, as compensation for surrendering the premises acquired under an invalid lease, who, pending suit for such surrender, made repairs thereto rendered necessary by a fire, making it substantially the same house as before without any additions, can recover the full value of the house as repaired.—BAXTER v. STATE, Ark., 19 S. W. Rep. 923.

73. LIMITATIONS—Payment of Taxes.—Under Rev. St. 1874, ch. 83, § 7, which provides that, whenever a person having color of title made in good faith to vacant land shall pay taxes thereon for seven successive years, he shall be deemed the legal owner, it is necessary for the holder of such title to obtain possession of the land before he can assert the bar of the statute.—GAGE v. SMITH, Ill., 31 N. E. Rep. 430.

74. LIS PENDENS—Constructive Notice.—Under section 85 of the Code, as it existed prior to 1887, where an action had been brought which affected the title or possession of real estate, and summons had been served or publication made, third parties were charged with notice of the pendency of the action, and while the action was pending could acquire no interest in the subject-matter, as against the plaintiff's title.—LINCOLN RAPID TRANSIT CO. v. RUNDLE, Neb., 52 N W. Rep. 563.

75. MALICIOUS ATTACHMENT.—Where an attachment is maliciously sued out on a claim against a partnership, and levied, not only on the partnership effects, but on all the property of the only responsible member, resulting in the destruction of the business and the loss of his individual property, and the attachment was made by collusion of another member with the creditor, such responsible member may maintain individually an action therefor.—GRIMES v. BOWERMAN, Mich., 52 N. W. Rep. 751.

76. MARSHALING ASSETS — Exhausting Securities.—A wife mortgaged real estate, conveyed to her by her husband, to complainant corporation, to secure the husband's debt, and at the same time the husband turned over a number of notes to complainant as collateral security and gave it a mortgage on his stock in trade: Held, that complainant should realize on the other securities before resorting to the mortgage on the real estate of the wife.—GRAND RAPIDS SAV. BANK v. DENISON, Mich., 52 N. W. Rep. 733.

77. MASTER AND SERVANT—Contributory Negligence.—In an action against a railroad company for personal injury, it must affirmatively appear from the complaint that the injured party was free from contributory negligence, and the best formula for the expression of that fact is the general averment that the injured party was himself without fault.—FORT WAYNE, C. & L. R. CO. v. GRUBB, Ind., 31 N. E. Rep. 460.

78. MASTER AND SERVANT — Fellow-servant.—A day laborer in a foundry, who was frequently called upon to assist in running out molds, was a fellow-servant of a laborer who made the molds, and his master was not liable for injuries sustained by him by the escape of molten metal due to the use of an imperfect flask in making a mold, when numerous flasks were provided, and there was no requirement to use the faulty one.—KEHOE v. ALLEN, Mich., 52 N. W. Rep. 740.

79. MASTER AND SERVANT—Fellow-servants.—A stone mason engaged in the construction of a bridge is a fellow-servant of carpenters at work on the same bridge.—BIER v. JEFFERSONVILLE, M. & I. R. Co., Ind., 31 N. E. Rep. 471.

80. MORTGAGES — Action to Foreclose.—Where the complaint, in an action by a junior mortgagee to foreclose, alleges that defendants, among whom is a senior mortgagee, who also holds a judgment lien junior to plaintiff's mortgage, have some interest in, or lien on, the mortgaged premises "accrued since the lien of" the mortgage sought to be foreclosed, and demands that all defendants be foreclosed of all their interests in the premises, and it is adjudged that the mortgage sued on is the prior lien on the premises, such judgment does not bar the right of the senior mortgagee to have his mortgage subsequently foreclosed.—ENGLISH v. ALDRICH, Ind., 31 N. E. Rep. 456.

81. MORTGAGES — Release.—An agreement to release from the operation of a mortgage any parcel of land described therein, upon payment at any time of a sum equal to the value of such parcel, must be construed as referring to the value of the parcel at the time of the release, and not at the date of the agreement.—PEOPLE'S SAV. BANK v. NEBEL, Mich., 52 N. W. Rep. 727.

82. MUNICIPAL CORPORATION—Defective Sidewalks.—In an action against a city for personal injuries caused by a defective sidewalk, a special finding that defendant had no "notice of the defective condition of the said walk before the time of the accident" negatives the existence of constructive as well as actual notice.—BERGEVIN v. CITY OF CHIPPEWA FALLS, Wis., 52 N. W. Rep. 588.

83. MUNICIPAL CORPORATION — Defective Sidewalk.—Walking upon a sidewalk, which the party knows to be in a dangerous condition, does not constitute negligence *per se*.—CITY OF SANDWICH v. DOLAN, Ill., 31 N. E. Rep. 416.

84. MUNICIPAL CORPORATIONS—Fire and Police Commissioners.—The general provision in section 172 of the charter of the city of Omaha for the removal of officers of the city by the district court does not apply to members of the board of fire and police commissioners.—STATE v. SMITH, Neb., 52 N. W. Rep. 700.

85. MUNICIPAL CORPORATION — Opening Street.—In proceedings to open a street, where the evidence showed that the parcel of land left after opening the street would be a narrow strip 13 feet wide, which would be worthless, the jury could give as compensation the actual value of the entire lot, together with any damages arising from such user.—CITY OF GRAND RAPIDS v. WIDDICOMB, Mich., 52 N. W. Rep. 635.

86. MUNICIPAL CORPORATION—Streets.—The owner of a lot abutting upon a street in a city is presumed to be the owner of the soil and freehold of the street in front of such lot to the center thereof, incumbered only by the easement in the public for passing and repassing over the same, and the rights of the municipality to use the same, or permit its use, for municipal purposes, as authorized by law.—EDMISON v. LOWRY, S. Dak., 52 N. W. Rep. 583.

87. MUNICIPAL IMPROVEMENTS — Assessments.—Pub. Acts 1883, No. 124, which provides that the just proportion of the compensation for private property taken by a city for public use shall be assessed on the owners or occupants of the land deemed to be thereby benefited, and that the assessment shall be a continual lien on the land assessed, plainly contemplates that the assessment is to be on the land.—BEECHER v. CITY OF DETROIT, Mich., 52 N. W. Rep. 731.

88. NEGLIGENCE — Infants.—Plaintiff, a boy 13 years old and of ordinary intelligence, while playing on defendant's turn-table, which he and other boys had put in motion, allowed his feet to project over the end, and they were crushed between it and an embankment on which the tracks were laid to the turn-table. Plaintiff testified that he knew that it was dangerous to let his feet project over as he did; that if he had thought of the danger he could have avoided it; but that he was having fun, and did not think of it: Held, that plaintiff was guilty of contributory negligence, and could not recover.—MERRYMAN v. CHICAGO, R. I. & P. RY. CO., Iowa, 52 N. W. Rep. 545.

89. NEGOTIABLE INSTRUMENT—Attorney's Fee.—In an action on a note which provides for an attorney's fee in its collection the value of such services may be shown without a specific averment that an attorney was employed.—STAMES v. SCHOFIELD, Ind., 31 N. E. Rep. 480.

90. NEGOTIABLE INSTRUMENT — Drafts—Indorsers.—J bought cattle from C, paying therefor by a draft on R. to whom they were consigned by J to be sold and paid for when sold. The bill of lading, which contained no restrictions as to delivery by the common carrier, was delivered with the draft to C, who sold the draft to

plaintiff bank, indorsing it in blank, and turning over with it the bill of lading. R paid on the draft the proceeds of the sale of the cattle, and refused to pay the balance: Held, in a suit against J and C for the deficit, that plaintiff was not bound to hold the bill of lading until the draft was paid.—FIRST NAT. BANK V. CRABTREE, Iowa, 52 N. W. Rep. 559.

91. NEGOTIABLE INSTRUMENTS — Indorsement after Maturity.—A second indorser of a note, who takes it after maturity, takes it free from any defense that could have been urged as against the first indorsee.—MATSON V. ALLEY Ill., 31 N. E. Rep. 419.

92. NEGOTIABLE INSTRUMENT — Reformation.—Plaintiff held a note signed "Herndon N. G. & L. Co. F A P, President. A H, Secretary," given for the exclusive benefit of the company. In signing it P and H intended to bind the company only, and plaintiff had no reason to believe otherwise: Held, in an action on the note against P & H, that defendants were entitled to have the note reformed so as to express the true contract of the parties, and that parol evidence was admissible to establish such contract.—LEE V. PERCIVAL, Iowa, 52 N. W. Rep. 543.

93. NEGOTIABLE INSTRUMENT—Usury as a Defense.—An indorsee of negotiable paper purchased before due, to be protected, must have purchased without notice of any defenses against the same, and have paid the consideration before notice of such defenses.—COLBY, V. PARKER, Neb., 52 N. W. Rep. 693.

94. NUISANCE — Damages to Private Property.—In order to be entitled to the relief guarantied by Const. art. 2, § 21, providing that private property shall not be damaged for public use without compensation, and that until such compensation "shall be paid the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested," a property owner must show the damages suffered are peculiar to himself, and different in kind from those sustained by other members of the community.—GATES V. KANSAS CITY B. & T. RY. CO., Mo., 19 S. W. Rep. 957.

95. PAROL EVIDENCE.—Defendant Contracted in Writing with plaintiff's agent for the purchase of a certain style of piano. Defendant's agent delivered a piano of another kind, the description of which he had fraudulently inserted in the contract, stating that he left it only as security until the other arrived: Held, in replevin by plaintiff to recover possession of the piano on refusal of defendant to pay the balance of the price, that parol evidence was admissible to show the real contract.—KRANICH V. SHERWOOD, Mich., 52 N. W. Rep. 741.

96. PARTITION.—Where a petition in partition shows the plaintiffs to be owners of the land, subject to the unassigned dower interest of the widow, conveyed by her to the defendant, and the defendant avers that the widow had dower and homestead which she conveyed to him, and that the land was sold to him also by the administrator, the averment relative to the sale controverts the petition, and is put in issue by a reply denying all averments so far as they did this.—COLVIN V. HAUENSTEIN, Mo., 19 S. W. Rep. 948.

97. PARTNERSHIP — Dissolution — Notice.—To relieve a retired member of a firm of liability incurred after a dissolution towards its ordinary customers, such customers must have received notice of dissolution.—HALL V. HECK, Mich., 52 N. W. Rep. 749.

98. PLEADING—Complaint—Amendment.—When in an action a demurrer to the complaint has been sustained, and judgment entered dismissing the complaint, it is error to allow plaintiff to serve and file an amended complaint, without first setting aside or vacating the judgment of dismissal.—GREELEY V. WINSOR, S. Dak., 52 N. W. Rep. 674.

99. PRINCIPAL AND AGENT — Payment.—An agent to make collections is not authorized to accept in payment of his principal's claim an account against himself, and so doing does not bind his principal.—UNION SCHOOL FURNITURE CO. V. MASON, S. Dak., 52 N. W. Rep. 671.

100. PRINCIPAL AND AGENT — Scope of Authority.—Plaintiffs sold grain for a commission which was fixed by the trade, and known to defendants, who had shipped grain to them for several years, during which time B acted as a special agent for plaintiffs in securing business. In a suit for advances, defendants counter-claimed under an alleged contract with B to allow them two cents a hundred pounds in addition to the regular market price received by plaintiffs. Plaintiffs' commission was less than two cents a hundred pounds: Held, that the alleged contract was outside of the apparent authority of the agent.—ELDER V. STUART, Iowa, 52 N. W. Rep. 660.

101. PRINCIPAL AND SURETY—Accounting.—In an action by a surety against his co-surety to compel contribution for payments on a note of their principal, it appeared that plaintiff received from the principal certain stock of greater value than the amount paid by him as surety. He claimed that he received the stock in settlement of a pre-existing indebtedness, but it appeared that he had previously acquired title to lands from the principal in settlement of such pre-existing debt, and no satisfactory account was given as to what evidence of debt was turned by plaintiff in consideration for the stock: Held, that the stock was received as indemnity.—WOODARD V. HAMILTON, Iowa, 52 N. W. Rep. 541.

102. PROCESS—Service — Presumptions.—Where persons served with process reside within the county of the officer serving it, or, like conductors of railways, are constantly passing through it, and the return is silent as to place of service, it will be presumed that the officer acted within the limits of his jurisdiction.—BALTIMORE & O. R. CO. V. BRANT, Ind., 31 N. E. Rep. 464.

103. PROCESS—Sheriffs and Constables—Fees.—A ministerial officer, such as a constable or sheriff, is neither authorized or required to serve a criminal process, which is void on its face, and is not entitled to fees from the county for doing so.—DEAN V. BOARD OF COM'RS OF RENVILLE COUNTY, Minn., 52 N. W. Rep. 650.

104. QUIETING TITLE—Bona Fide Purchasers.—Possession of the granted premises by the grantor after delivery of his deed is as effectual, as notice of the interest of the occupant, as possession by a stranger to the record title.—GROFF V. STATE BANK OF MINNEAPOLIS, Minn., 52 N. W. Rep. 651.

105. RAILROAD COMPANIES—Crossings.—In an application by a railway company under chapter 80, Laws 1879, for the appointment of commissioners to assess the damages for crossing the property and tracks of another railway company, the court may not only prescribe the place, angle, and elevation of the crossing, but also that the petitioning company shall do what to the court shall seem reasonably practicable to make and keep the crossing safe to the trains of the other company and to the public, and for that purpose may require it to construct and maintain a known and approved device to enable trains to pass a crossing without danger of collision.—WINONA & S. W. RY, CO. V. CHICAGO, M. & ST. P. RY. CO., Minn., 52 N. W. Rep. 657.

106. RAILROAD COMPANIES—Crossings—Negligence.—Where a person is struck at a railway crossing in a city by a train which, had she stopped at a point 35 feet from the crossing, and looked for trains, she must have seen approaching, she is guilty of such contributory negligence as bars a recovery for injuries there received, though the train was running faster than permitted by ordinance, and the company had no flagman stationed at the crossing, as required by law.—SALA V. CHICAGO, R. I. & P. RY. CO., Iowa, 52 N. W. Rep. 664.

107. RAILROAD COMPANIES—Contributory Negligence.—A switchman who is injured while violating a positive rule of the railroad company, which forbids jumping on switch engines while they are in motion, by standing in the middle of the track and stepping onto the foot-board is guilty of contributory negligence.—

FRANCIS V. KANSAS CITY, ST. J. & C. B. R. CO., Mo., 19 S. W. Rep. 935.

108. RAILROAD COMPANIES—Overflow of Lands.—Damages to land, resulting from overflows caused by the negligent construction of a railway culvert, cannot be deemed to have been considered and settled for when the right of way through the land was acquired.—HUNT V. IOWA CENT. R. CO., Iowa, 52 N. W. Rep. 668.

109. RAILROAD COMPANIES — Street Railways—Damages.—Evidence that a contract for excavating a street for a cable road was made in a third person's name, but at the instance of defendant and for its benefit, and that the work was paid for out of its funds, and the fruits thereof enjoyed by it, renders defendant liable for damages resulting therefrom.—BRADY V. KANSAS CITY CABLE RY. CO., Mo., 19 S. W. Rep. 953.

110. RAILROAD COMPANIES—Traffic Association.—Several railroad companies composing a traffic association are severally, as well as jointly, liable for injuries received by an employee of the association on account of its negligence.—WISCONSIN CENT. R. CO. V. ROSS, Ill., 31 N. E. Rep. 412.

111. REAL ESTATE AGENT—Commission.—A promise by one person to a broker to compensate him on a sale of land if made upon his introduction, followed by a sale so made by such person as administrator, constitutes a personal contract, unconnected with the ownership of the land upon which compensation is recoverable.—MOORE V. DAIBER, Mich., 52 N. W. Rep. 742.

112. SALE—Measure of Damages.—Where the articles contracted for may be purchased in the open market, the measure of damages on breach of an agreement is the market prices on the day appointed for delivery, less the contract price, when the latter is not paid.—BOYER V. COX, Neb., 52 N. W. Rep. 715.

113. SALE—Parol Evidence.—Negotiations preliminary in a written contract, and in direct conflict with it, are not admissible in evidence without evidence to show a subsequent modification of the contract in accordance therewith, or of false representation. — TAYLOR V. DAVIS, Wis., 52 N. W. Rep. 756.

114. SCHOOLS — Powers of Trustees.—The board of trustees of a high school have power to adopt and enforce appropriate and reasonable rules and regulations for the government and management of the schools under their control.—BOURNE V. STATE, Neb., 52 N. W. Rep. 710.

115. SENTENCE—Term of Imprisonment.—Under section 518 of the Criminal Code, the term of imprisonment of one sentenced to the penitentiary dates from the sentence, and not from the delivery of the prisoner to the warden of the penitentiary.—IN RE FULLER, Neb., 52 N. W. Rep. 577.

116. SLANDER—Evidence.—In an action of slander for words imputing larceny to plaintiff, though there is a presumption from the falsity of the words spoken that they were spoken maliciously, the presumption is only *prima facie*, and may be rebutted.—SMITH V. RODECAP, Ind., 31 N. E. Rep. 479.

117. TAXATION—Assessment.—The fact that an assessment roll cannot be found in the office where the law required it to be kept does not establish the fact that it was not regularly filed there.—JOYNER V. HARRISON, Ark , 19 S. W. Rep. 920.

118. TAXATION—Illegal Assessment.—Where a county auditor makes an illegal assessment, and the taxes are collected by levy and execution, the person injured can recover from the county the amount so illegally collected.—HENNEL V. BOARD OF COMRS., Ind., 31 N. E. Rep. 462.

119. TAX SALE—Recovery of Money Paid.—Land on which the owner has given a mortgage to the State to secure school funds is as much liable to taxation as any land, so that one buying it at a tax sale, within the year for redemption from a sale on foreclosure of the mortgage, cannot by reason of such mortgage and foreclosure recover the amount paid, under the provisions of Rev. St. 1881, § 6487, and Acts 1883, p. 95, § 1, allowing such recovery where the land sold was not subject to taxation, and the sale was "without authority of law."—MCWHINNEY V. CITY OF LOGANSPORT, Ind., 31 N. E. Rep. 449.

120. TOWNSHIP SCHOOL TAXES.—Under Rev. St. § 5995, requiring the levy of township taxes for general purposes to be concurred in by the county commissioners, and section 4467, empowering trustees of townships, towns, and cities to levy a special school tax, not to exceed a certain amount, it is unnecessary that the county commissioners concur in a levy of a special school tax by a township trustee.—COLE V. STATE, Ind., 31 N. E. Rep. 451.

121.—TRIAL—Examination of Jurors.—Upon the preliminary examination of jurors counsel have no right to ask which way they would decide the case if the evidence was equally balanced.—CHICAGO & A. R. CO. V. FISHER, Ill., 31 N. E. Rep. 406.

122. TRIAL—Right to Jury.—Where the facts stated in a complaint present no ground for a specific decree, and it is sought to recover compensation by way of damages only, it is proper to submit the cause to a jury; the rule being that if a remedy sought be equitable the court cannot be required to call a jury, but if it be legal the trial is by jury, unless the jury is waived.—ROBERTSON V. MCPHERSON, Ind., 31 N. E. Rep. 478.

123. TRUST—Husband and Wife.—Where a father, who had intended to convey certain land to a daughter as an advancement, conveys the same to a son upon the son's agreement to convey to the daughter other land of which he was the owner, and the daughter leaves the consummation of this agreement to her husband, who, instead of having the conveyance made to her, takes it to himself, equity will decree the title to be in trust for the wife.—WARNER V. WARNER, Ind., 31 N. E. Rep. 466.

124. VENDOR AND PURCHASER—Bona Fide Purchasers.—Since under the laws in Missouri, in 1875, the absolute title to a homestead passed to and vested in his widow on the death of a householder, the title of the widow's grantee is not affected by a will left by her husband, giving her a life estate only, where the will was not probated or recorded in Missouri, and the grantee had no knowledge of its existence.—VAN SYCKLE V. BEAM, Mo., 19 S. W. Rep. 946.

125. VENDOR AND PURCHASER — Statute of Frauds.—Held, upon the facts that writings were insufficient to constitute a note or memorandum in writing, signed by the defendant, of a contract to purchase land, as required by Rev. St. 1891, ch. 59, § 2.—MILLER V. WILSON, Ill., 31 N. E. Rep. 423.

126. VENDOR AND VENDEE—Part Payment.—If a purchaser has advanced money in part performance of a contract, and, without fault on the part of the seller, refuses to proceed, the seller being ready and willing to perform on his part all the stipulations of the agreement, the purchaser cannot recover back what he has paid.—WALTER V. REED, Neb., 52 N. W. Rep. 682.

127. VENDOR AND PURCHASER—Specific Performance.—A purchaser of land cannot obtain an enforcement of his contract where he neither tenders the purchase price, nor brings the money into court, nor offers to pay it.—SHORT V. KIEFFER, Ill., 31 N. E. Rep. 427.

128. WILLS—Contest—Costs.—Where a will is contested by the heirs, the losing party, and not deceased's estate, should be required to pay the costs of such contest; Code, § 2933, providing that "costs shall be recovered by the successful against the losing party."—ALLEN V. LEONARD, Iowa, 52 N. W. Rep. 557.

129. WITNESSES—Transactions with Decedent.—In an action against the sureties of an executor to recover a legacy, where the defendants plead payment, and evidence is offered to prove that plaintiff had authorized a certain person to collect for her the said legacy, but such person is since dead, it is not competent for the executor who is not a party to testify to such payment.—LEACH V. MCFADDEN, Mo., 19 S. W. Rep. 947.

A NEW INDEXED ATLAS OF THE WORLD.